

No. 12262

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United States  
Court of Appeals  
For the Ninth Circuit.

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CLAUDE T. LINDSAY and MARTEL WILSON,  
Appellants,  
vs.

UNITED STATES OF AMERICA,  
Appellee.

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Transcript of Record

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Upon Appeal from the United States District Court  
for the Northern District of California,  
Southern Division

AUG - 5 1949

PAUL P. O'BRIEN,

CLERK



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## INDEX

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

PAGE

### Appeal:

Appellant's Statement of the Points on Which They Intend to Rely on.....	169
Certificate of Clerk to Record on.....	19
Designation of Record on.....	18, 171
Notice of.....	18
Appellant's Statement of the Points on Which They Intend to Rely on Appeal.....	169
Certificate of Clerk to Record on Appeal.....	19
Certificate of Reporter.....	120
Complaint for Breach of Contract.....	2
Conclusions of Law.....	16
Designation of Record on Appeal.....	18, 171
Findings of Fact.....	12
Findings of Fact and Conclusions of Law.....	12
Judgment .....	17
Memorandum and Order.....	9
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	18

## INDEX

## PAGE

Reporter's Transcript..... 21

Witnesses, Defendant:

Ferguson, Guy H.

—direct ..... 148

—cross ..... 151

Taylor, Allen F.

—direct ..... 89

—cross ..... 112, 152

Witnesses, Plaintiff:

Lindsay, Ray T.

—direct ..... 64, 137, 161

—cross ..... 78, 138, 162

—redirect ..... 85, 165

—recross ..... 166

Nickel, Thomas R.

—direct ..... 33, 134

—cross ..... 49

—redirect ..... 63

Taylor, Allen F.

—direct ..... 142

—cross ..... 151





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United States Attorney,

Northern District of California,

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San Francisco, California.

Before: The Honorable Dal M. Lemmon,

District Judge, sitting without a jury.

In the District Court of the United States for the  
Northern District of California, Southern Division

No. 26236-S

CLAUDE T. LINSDAY and MARTEL WILSON,  
Plaintiffs,

vs.

UNITED STATES OF AMERICA,  
Defendant.

## COMPLAINT FOR BREACH OF CONTRACT

The plaintiffs complain of the defendant and for  
cause of action allege:

### I.

That this action is commenced against the United States pursuant to and under authority of Act of March 3, 1875, Chapter 37, and amendments thereto (28 U.S.C. Sec. 41, Subd. 20) to recover a claim for damages against the United States of America in the amount of \$6,833.61, founded upon an express contract with the Government of the United States of America.

### II.

That on or about the 15th day of June, 1942, the plaintiffs and the defendant entered into a written contract under which the plaintiff undertook to construct for the defendant a certain defense housing project at Benicia, California, and called and identified as Defense Housing Project CAL-4017.

## III.

That in said contract it was provided among other things that the defendant would furnish for use by the plaintiffs in the construction of the defense housing project above referred to all dwelling unit plumbing fixtures; that the defendant has failed to perform such agreement on its parts as follows, to wit:

That the ordinary and reasonable construction and meaning of said provision in said contract providing that defendant would furnish all dwelling unit plumbing fixtures is that defendant was required to furnish said dwelling unit plumbing fixtures in such a manner that complete installation could be made of the fixtures in a single trip to each house; that the usual custom and good plumbing practice in the community where said contract was entered into and to be performed was for all plumbing fixtures in jobs as was involved in the contract herein alleged to be installed in a single trip to each house; that defendant failed to furnish said fixtures in such a manner that complete installation could be made of the fixtures on a single trip to each house, but to the contrary furnished such fixtures and parts and types thereof intermittently and piecemeal from about August 4, 1942, to on or about December 27, 1942, and directed plaintiffs to install said fixtures piecemeal as furnished; that in order for plaintiffs to perform said contract as directed by defendant it was necessary for plaintiffs to install said fixtures piecemeal as they were furnished

by defendant and to make numerous trips to each house; that plaintiffs notified defendant when said fixtures were delivered to plaintiffs piecemeal and when plaintiffs were directed to install said fixtures piecemeal as aforesaid that said failure to furnish said fixtures in the manner as required by said contract as aforesaid would result in damage to plaintiffs by increasing the cost of installation over that which would have been required had said fixtures been furnished by defendant in the manner required by said contract as aforesaid; that defendant, despite said notice, failed to furnish said fixtures as provided in said contract, and directed plaintiffs to proceed with the installation of said fixtures piecemeal; that plaintiffs thereupon did install said fixtures piecemeal as directed by defendant, in order to complete said contract as directed by defendant.

#### IV.

That by reason of said failure of defendant to furnish said dwelling unit plumbing fixtures as required by said contract, as aforesaid, but instead, furnishing said fixtures piecemeal, as aforesaid, plaintiffs were required to incur additional expenses over and above what would have been required had said fixtures been delivered as required by said contract as aforesaid; that said additional expenses were in the amount of \$6,833.61; that plaintiffs were thereby damaged by said failure of defendant to deliver said fixtures as provided in said contract in the amount of \$6,833.61.



## V.

That the above-mentioned contract between plaintiffs and defendant provides that disputes concerning questions of fact arising under the contract shall be decided by the contracting officer subject to written appeal by the contractor within thirty days to the head of the department concerned or his duly authorized representative; that in the meantime the contractor shall diligently proceed with the work as directed; that pursuant to this provision the plaintiffs did prior to the bringing of this action make formal claim to the contracting officer for the above-mentioned damages in the amount of \$6,833.61; that said claim was presented on or about September 10, 1943; that under date of April 19, 1945, the contracting officer ruled that the contractor was entitled to \$2,696.00 of said claim, but denied the plaintiffs' claim of the balance, to wit, \$4,137.61; that within thirty days of said decision of said contracting officer and on or about May 18, 1943, the plaintiffs appealed from said decision of said contracting officer to the head of the department concerned as provided in Article 15 of said contract above mentioned; that the head of the department concerned did refuse and fail to allow the full amount of plaintiffs' claim, but ruled plaintiff was entitled to only \$2,696.00 and refused to allow the balance claimed, to wit, an amount of \$4,137.61; that said decisions by the contracting officer and the head of the department as mentioned above in disallowing said claim in the amount of \$4,137.61 were unreasonable,

arbitrary, and unsupported by any evidence or facts whatsoever; that defendant has not paid and there is still unpaid the entire amount of said claim, to wit, the amount of \$6,833.61.

## VI.

That the plaintiffs have performed all of the terms and conditions of said contract on their part to be performed.

## VII.

That by reason of the aforesaid act of defendant in the breach of the contract above mentioned, plaintiffs have been damaged in the amount of \$6,833.61.

Wherefore, plaintiffs pray judgment against the defendant for the sum of \$6,833.61 and interest, for costs of suit, and for such other and further relief as to the court may seem just and proper.

JOHNSON, HARMON &  
STIRRAT.

/s/ WILLIAM H. HENDERSON,  
Attorneys for Plaintiff.

State of California,  
City and County of San Francisco—ss.

Claude T. Lindsay, being first duly sworn, deposes and says:

That he is one of the plaintiffs in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge except as to

matters therein stated on information and belief, and as to those matters he believes it to be true.

/s/ CLAUDE T. LINDSAY.

Subscribed and sworn to before me this 30th day of July, 1946.

[Seal]      /s/ NEIL T. DUFFY,

Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires January 3, 1947.

[Endorsed]: Filed Aug. 1, 1946.

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[Title of District Court and Cause.]

### ANSWER

Comes now the defendant above named and in answer to the Complaint on file herein, admits, denies and alleges as follows:

#### I.

As to the allegations of paragraph one defendant leaves matters of jurisdiction to the Court.

#### II.

Admits the allegations of paragraph II.

#### III.

As to the allegations set out in paragraph III of

said Complaint defendant admits that by the said contract it did agree to furnish all plumbing fixtures; denies that it did in the particulars alleged or at all fail to perform said agreement.

#### IV.

As to the allegations set out in paragraph IV of said Complaint defendant denies that it did as alleged or at all fail to deliver said plumbing fixtures; further denies that plaintiff has been damaged in the sum of Six Thousand Eight Hundred Thirty-Three and 61/100 Dollars (\$6833.61) or any sum at all.

#### V.

Admits the allegations set out in paragraph V of said Complaint, save and except the allegation that its refusal to allow the balance of said claim was as alleged or at all unreasonable and/or arbitrary and/or unsupported by evidence. In this connection defendant alleges that its decision through said contracting officer was intended to and would, if accepted, have compensated plaintiff fully for all additional costs incurred by plaintiff because of any delay in the delivery of materials by defendant, if any such there was.

#### VI.

Defendant admits the allegations contained in paragraph VI of said Complaint.

Wherefore defendant prays that plaintiffs take nothing by virtue of their Complaint on file herein

and that defendant be dismissed hence with its costs of suit herein incurred.

/s/ FRANK J. HENNESSY,  
United States Attorney.

/s/ WILLIAM E. LICKING,  
Asst. United States Attorney,  
Attorneys for Defendant.

[Endorsed]: Filed Jan. 31, 1947.

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[Title of District Court and Cause.]

### MEMORANDUM AND ORDER

Plaintiffs seek to recover \$6,833.61 for breach of contract alleging that the failure of the defendant to furnish the plumbing materials in units for installation by plaintiffs' sub-contractor necessitated piecemeal installation with increased cost to plaintiffs in the amount sought in this action. It is admitted that failure to furnish the materials was excusable due to the material shortages occasioned by the war. Plaintiffs allege that piecemeal installation was necessary to complete the emergency housing as quickly as possible, and that it was ordered by defendant. Defendant contends that some of the work was done before it ordered piecemeal installation and that it is not liable for the added cost for that work.

In any event the matter was submitted to an arbitrator under the terms of the contract. The contract provides:

“Article 15. Disputes.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.”

Plaintiffs followed this procedure and made a formal claim to the contracting officer who ruled that the plaintiffs were entitled to \$2,696.00 of the \$6,833.61 sought. Plaintiffs appealed to the head of the department who made the same decision. It is contended here that this decision was unreasonable, arbitrary, and unsupported by any evidence.

Arbitration is favored by the courts. By the contract plaintiffs agreed to a method of settling disputed facts, a type of arbitration. “It is well established that every reasonable presumption will be indulged to sustain an award, and that a court may not substitute its judgment for that of the arbitrators, or set aside an award for mere inadequacy in amount, unless it is so great as to indicate corruption or partisan bias on the part of the arbitrators.” *Firemen’s Fund Ins. Co. v. Flint Hosiery Mills, Inc.*, 74 F. 2d 533, 536.



That the arbitrators provided for by the contract herein are public officers or employees is immaterial as contracts containing such provisions are valid, "and the decision of the person named generally can be attacked only in the same manner as that of any other arbitrator." 43 Am. Jur. 813; Sweeney v. U. S., 109 U. S. 618; Goltra v. Weeks, 271 U. S. 536, 548.

The mere fact that the contracting officer and the head of the department did not follow the precise procedure that plaintiffs feel should have been used in arriving at the amount that plaintiffs were damaged by the delay in furnishing materials is insufficient for this court to set aside their award.

It is not necessary that findings be signed by the arbitrators. In re Connor, 128 Cal. 279; 112 A.L.R. 874n.

The evidence present is insufficient to show that the contracting officer and the head of the department acted so inequitably that this court would be justified in setting aside the award and granting damages in this action.

It is ordered that judgment be for the defendant; defendant to prepare findings of fact and conclusions of law in accordance with the local rule.

Dated: October 13th, 1948.

/s/ DAL M. LEMMON,

United States District Judge.

[Endorsed]: Filed Oct. 13, 1948.

[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial on Friday, October 17, 1947, and trial was had on said day and on October 20, 1947, before the court sitting without a jury; Johnson, Harmon, and Stirrat and William H. Henderson by W. Glenn Harmon and William H. Henderson appeared as counsel for plaintiffs and William E. Licking appeared as counsel for the defendant; and the court having heard the testimony and having examined the proofs offered by the respective parties and the cause having been submitted to the court for decision and the court being fully advised in the premises now makes its findings of fact and conclusions of law as follows:

### FINDINGS OF FACT

#### I.

That this action was commenced against the United States of America and arises pursuant to and under authority of Act of March 3, 1875, Chapter 37, and amendments thereto (28 U.S.C. Sec. 41, Subd. 20) to recover a claim for damages against the United States of America in the amount of \$6,833.61, founded upon an express contract with the Government of the United States of America.

#### II.

That on or about the 15th day of June, 1942, the



plaintiffs and the defendant entered into a written contract under which the plaintiffs undertook to construct for the defendant a certain defense housing project at Benicia, California, and called and identified as Defense Housing Project Cal-4017.

### III.

That in said contract it was provided among other things that defendant would furnish for installation by plaintiffs in the construction of the Defense Housing Project above referred to, certain fixtures to be installed in said housing project. That said contract in this respect provided as follows, to wit:

#### Division D-15, Section 1:

“(e) Dwelling unit plumbing fixtures, as hereinafter specified, will be furnished by the Government and shall be set and connected by the Contractor. Fixtures for non-dwelling unit buildings shall be furnished, set and connected by the Contractor as hereinafter specified.”

#### Sec. 3. Equipment Not Included in Contract.

1. The following items of equipment will be furnished to the Contractor by the Government and shall not be included in this Contract:

- (a) Space Heaters.
- (b) Domestic Water Heaters.
- (c) Ranges.
- (d) Refrigerators.
- (e) Bathroom Fixtures: (Plumbing).
- (f) Medicine Cabinets.

- (g) Kitchen Fixtures: (Plumbing).
- (h) Lighting Fixtures."

That said contract was later modified to delete the medicine cabinets and lighting fixtures from the list of fixtures to be furnished by defendant.

#### IV.

That said contract further provided among other things that the plaintiffs should prepare and furnish the government with a list of said fixtures required and date of delivery to the project. That pursuant to said provisions, plaintiffs on or about June 26, 1942, signed requisition orders requesting delivery by the defendant by August 1, 1942, of all of the items of said fixtures to be furnished by defendant under said contract. That said fixtures and equipment were not delivered by defendant by August 1, 1942, as requested by plaintiffs but actual deliveries of all said items were spread over the time from August 12, 1942, to January 22, 1943.

#### V.

That custom and good plumbing practice in the community where the said project was to be constructed was that all of said fixtures should be installed in a single trip to each unit. That representatives of defendant were notified that such piecemeal installation would result in an increase in the cost. That defendant's representatives nevertheless ordered plaintiffs to install said fixtures piecemeal as they arrived. That plaintiff did install the said fixtures piecemeal as they arrived as di-

rected by defendant. That plaintiffs did all of said installation by sub-contract to E. H. Frick Plumbing Company on a cost plus basis. That plaintiffs paid \$13,047.27 to Frick Plumbing Company for the installation of said fixtures.

## VI.

That Article 15 of said contract between plaintiffs and defendant provided:

“Article 15. Disputes.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.”

That plaintiffs followed the procedure set out in the above Article and made a formal claim to the contracting officer for their excess costs in the amount of \$6,833.61; that said contracting officer ruled that the plaintiffs were entitled to \$2,696.00 of the \$6,833.61, that in further compliance with said provisions, plaintiffs appealed to the head of the department who made the same decision as the contracting officer; that plaintiffs in all respects performed all the acts and conditions of said contract on their part to be performed; that said Article

15 of said contract constituted an arbitration agreement between plaintiffs and defendant with respect to the plaintiffs' claim herein. That the method of calculating under Article 15 of the contract used by the contracting officer and head of the department resulting in said increase of \$2,696.00 and the determination by each of them was reasonable and was neither arbitrary nor capricious. That there was no such discrepancy or inadequacy between the amount sought and the amount allowed by the contracting officer as to indicate corruption or a partisan bias on the part of said contracting officer or head of the department. That the contracting officer and the head of the department did not act so inequitably so that this court would be justified in setting aside the award and granting damages in addition to the amount of the award.

### CONCLUSIONS OF LAW

Upon the above findings of fact it is concluded that plaintiffs are entitled to judgment in the amount of \$2,696.00, only, the amount found due to plaintiffs by defendants by the said contracting officer.

Let judgment be ordered accordingly.

Dated: April 6th, 1949.

/s/ DAL M. LEMMON,

United States District Judge.

[Endorsed]: Filed April 6, 1949.

In the District Court of the United States for the  
Northern District of California, Southern  
Division

No. 26236-S-L

CLAUDE T. LINDSAY and MARTEL WILSON,  
Plaintiffs,

vs.

UNITED STATES OF AMERICA,  
Defendant.

### JUDGMENT

This cause came on regularly for trial before the Court sitting without a jury on the 17th day of October, 1947, and trial was had on said day and on October 20, 1947; Johnson, Harmon and Stirrat, and William H. Henderson and W. Glenn Harmon and William H. Henderson appeared as counsel for the plaintiffs and William E. Licking appeared as counsel for the defendant, and the Court having heard the testimony and having examined the proofs offered by the respective parties, and the court being fully advised in the premises, and having filed herein its findings of fact and conclusions of law, and having directed that judgment be entered in accordance therewith; now, therefore, by reason of the law and findings aforesaid:

It is hereby ordered, adjudged and decreed that plaintiffs have judgment against defendant in the sum of \$2,696.00, with interest thereon at the rate of 7% per annum from January 4, 1943, until paid.

Dated this 6th day of April, 1949.

/s/ DAL M. LEMMON,

United States District Judge.

Entered in Civil Docket April 7, 1949.

[Endorsed]: Filed April 6, 1949.

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice is hereby given that Claude T. Lindsay and Martel Wilson, plaintiffs above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on April 7, 1949.

JOHNSON, HARMON,  
STIRRAT & HENDERSON.

By /s/ ROBERT H. JOHNSON,  
Attorneys for Plaintiffs.

[Endorsed]: Filed May 5, 1949.

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[Title of District Court and Cause.]

### DESIGNATION OF RECORD ON APPEAL

Comes now the plaintiffs and appellants herein and pursuant to Rule 75 of the Federal Rules of Civil Procedure designates the record on appeal to



the United States Court of Appeals for the Ninth Circuit, as follows, to wit:

1. The pleadings of the parties.
2. The Findings of Fact and Conclusions of Law.
3. The Judgment appealed from.
4. The Notice of Appeal.
5. The Designation of Contents of Record on Appeal.
6. The Reporter's transcript of the evidence and proceedings.
7. It is requested that all exhibits be transmitted to the said Court of Appelas, together with the clerk's transcript.

Dated: May 13, 1949.

JOHNSON, HARMON,  
STIRRAT & HENDERSON.

By /s/ WILLIAM H. HENDERSON,  
Attorneys for Plaintiffs.

Received a copy of knowledge.

[Endorsed]: Filed May 13, 1949.

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[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD  
ON APPEAL

I, C. W. Calbreath, Clerk of the District Court  
of the United States for the Northern District of

California, do hereby certify that the foregoing and accompanying documents and exhibits listed below, are the originals filed in this Court in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the Appellants, to wit:

Complaint for Breach of Contract.

Answer.

Memorandum and Order.

Findings of Fact and Conclusions of Law.

Judgment.

Notice of Appeal.

Designation of Record on Appeal.

Plaintiffs' Exhibits Nos. 1, 2, 3-A, 3-B, 4, 5, 6, 7 (Box of Records, contains 30 Folders, Payrolls, Weekly Payrolls 9-24 inc. Weekly Payrolls 1-30 inc. 47 pages Cost Accounting Breakdown), 8 and 9.

Defendant's Exhibit No. A.

Reporter's Transcripts—Vol. 1, Oct. 17 and 20, 1947; Vol. 2, Oct. 20, 1947.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 10th day of June, 1949.

[Seal]

C. W. CALBREATH,  
Clerk.

By /s/ M. E. VAN BUREN,  
Deputy Clerk.



In the Southern Division of the United States  
District Court for the Northern District of  
California.

No. 26236

CLAUDE T. LINDSAY and MARTEL WILSON,  
Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

Before: Hon. Dal M. Lemmon,  
Judge.

# REPORTER'S TRANSCRIPT

Friday, October 17, 1947—10:00 A.M.

Appearances: For the Plaintiffs—Johnson, Harmon & Stirrat and William H. Henderson, by W. G. Harmon, Esq.

For the United States—William E. Licking, Esq.,  
Assistant United States Attorney. [1\*]

The Clerk: Lindsay v. The United States.

Mr. Harmon: Ready, Your Honor.

Mr. Licking: Ready.

The Court: You may proceed.

Mr. Harmon: If the Court please, I shall make a preliminary statement at this time on the nature of this action. I understand, may I say at the outset, that we have only reserved this one day and we

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\* Page numbering appearing at top of page of original Reporter's Transcript.

want very much to complete it on this day. There is quite a mass of documentary evidence and much of it is very important, but rather than to take up the time in trying to read it into the record as the case goes in, because of the shortage of time, if it is all right with the Court, I just want to call attention to the fact that it is very important and there will be a brief summary of it and I will comment on our theory of the case in this opening statement, and then we anticipate and would like to submit the case on briefs, so that we can surely finish with the trial today.

The Court: Very well.

Mr. Harmon: Briefly, Your Honor, the situation is this: Back in 1942 the Government entered into a contract for the erection of certain housing over in Benicia, from 200-odd units, with the plaintiff in this action. They were to erect that housing unit at a total price of something like \$728,000. The contract was completed and construction was supposed to start early in 1942. [2]

The contract provided, among other things, that certain plumbing fixtures would be supplied by the Government and be installed by the contractors. It provided that the contractor should designate the time when the fixtures should be installed, or should be delivered for installation. It is what we call a mass purchase item which the Government apparently thought it could procure and supply better than the contractors could, and the whole contract was one of getting this housing completed as soon as possible.

The fixtures were requisitioned by the contractors for delivery August 1, 1942. They did not come at that time. There were various delays and the fixtures dribbled in in small quantities and none of them—I say none of them—at least most of them not complete, over a period of months running from October or maybe some of it was delivered earlier than that; anyhow, a period of months up into January. One fixture would arrive without parts for it, and sometimes some of the fixtures would come without any other fixtures.

The contract was entered into, of course, on the basis of mass building and with the idea that the contractor could install these materials quickly and enmasse, and keep his costs down in that fashion. Protests were made because of the failure to receive these, and requests were made for extensions of time, and then when the fixtures started to arrive, the persons representing the Government insisted that they be installed as [3] received—just as rapidly as received, even though not complete.

The contractors objected to that because it meant excessive costs and it was their plan to wait until all of the items had been received and then they could be installed in one group and the project finished. That was not satisfactory to the Government and its representatives, however. They were under pressure, apparently, for completed housing to be made available as rapidly as possible and they insisted that these items be installed as they came, regardless of how many came, regardless of the

completion, the completeness of the item that arrived, and at one time—at least one time and perhaps more than one—it was even threatened that if they didn't install them on that date, that the Government would put its own plumbers on and do the installation.

This resulted in overtime work, work late at night and early morning, on holidays and Sundays, at times that the contractors could not control, and at heavy expense, because of this overtime work.

The delays also ran them into the rainy season which complicated the matter, and at one time the roads were bogged down out there. It was a new project. The street work had not been finished, and at one time when some of these fixtures arrived the Government even refused to let them wait over the weekend until there might be a little dryness in the weather and they could get onto the project. [4]

These matters were pointed out to the representatives of the Government from time to time and they were notified that reimbursement would be expected. Early in the stage when the work was being completed, the correspondence will show that they asked for at least \$10 per unit additional cost because of that. None of the orders to install that stuff, as it appeared, were made in writing, although it was requested that these instructions be given in writing, and it is my understanding that that was promised. The promise was overlooked or was not kept, in any event, so that there is no written authorization at the time the work was involved to do this extra work.

In the early spring of 1943, the date of which will appear from the documents, formal demand was made, notice to the Government was made of the total cost. The cost had exceeded greatly the estimate that the contractor had put in his bid.

I might say in that regard, if Your Honor please, that the testimony will show that the reasonable cost of the installation of these units had they been received and installed in accordance with customary plumbing practice, at one time, would not have exceeded \$35 per house, or a total of somewhere around \$7,000; whereas, as a matter of fact, and in accordance with the claim filed by the contractor, the total cost to the contractor ran up to something in excess of \$13,000, making an excess in actual expenditure on labor to plumbers of around \$5900.

A claim was filed for that amount in accordance with the terms of the contract and to it was added a sum, I think 15 per cent, for the contractor's added overhead. The testimony will show that that was very reasonable and in fact it was an underestimate.

The testimony will show, too, I think, your Honor, that there are other damages that were occasioned which are not included in that claim, such as, for example, requiring these units to be installed piecemeal and in the worst weather, installed by plumbers going in, tracking over floors that had been finished and required refinishing by carpenters. None of that expense was put in the claim.

There was a conference held on that claim and



it was a lengthy conference, and at the end of it the contractor—the officers seemed to feel that it shouldn't be allowed and the contractor said, "What will you allow?" and they suggested that they would approve an allowance of \$3,000, and he, in order to get the matter behind him, said, "All right. We will submit a claim for that amount." So an itemized claim was again submitted, showing the total amount and then the willingness to accept \$3,000. That was approved by the officers in the immediate charge of the project and sent on to, I think, the San Francisco office, for processing.

There it was turned down and no money was paid to the contractor as a result. [6]

When the matter was turned down, in accordance with the terms of the contract, the contractor filed a claim for the full amount. He had gone on under the contract, because it required in the event of any dispute he shall proceed with the work and he had elected to do that rather than to stand upon his right to insist upon an immediate understanding.

That claim got lost, apparently, in the files of the Government for some time, and later on—I won't attempt to give the date; it all appears in the documents—the contractor learned that it had been lost and he was requested to file a new claim and a new claim was filed, and that was acted upon in the department and in some fashion not disclosed to the contractor, and information thereon refused to the contractor, the examining officer saw a basis for allowing \$2600-odd of the claim as excess of labor

that had been caused through this procedure. I might say that the claim was supported by written statements at that time of the officers in charge concerning the fact that they had required this work to be done because of the interest of the Government and that it had resulted in some excessive cost. The action rejected the major part of the claim in excess of \$4,000 on the ground—I don't recall, but—held that it wasn't proper under the contract, and the contractor was sent forms to indicate his acceptance of that decision.

A consent was prepared and returned which accepted the \$2600, reserving the right to the other. That was not satisfactory [7] to the officers of the Government, so that no further action was taken on that and no part of it has been paid. Instead, the contractor prepared an appeal, as required by the contract itself, to the proper officers, and supported it with documentary evidence on the claim, and in due course of time that appeal was rejected and we are now here in court.

However, we are in court on the theory not of an amount due under this contract from the Government, but for damages due to the breach of the contract by the Government, the breach consisting in the Government's failure to deliver these plumbing items in accordance with the terms of the contract and so they could be installed in an economical and customary good plumbing manner, and the amount of the damage that we have asked for is the excess cost that it has resulted in to the contractor.

I believe that covers a general statement of it.

The Court: Does the contract require that these plumbing fixtures, I understood you to say, would be delivered en masse?

Mr. Harmon: The contract provides, Your Honor, that the Government should supply them. There is no statement in the contract as to the time of delivery but the whole essence and purpose of the contract is speed. It is a mass contract. It was expected that they would be delivered en masse. The evidence will show that clearly and the contract provided further, explicitly, that the contractor should designate the date of [8] delivery, which the contractor did, calling for the delivery on August the first of that year. And that was a very important item to him, not only to avoid the rainy weather, but to permit the proper installation in an economical, good manner.

The Court: Very well.

Mr. Licking: We are prepared, Your Honor, to concur in the statement of fact. I take it that the contract will be the first item to be introduced in evidence?

Mr. Harmon: Shall I proceed? I have it all outlined here. I thought you might want to make an additional——

Mr. Licking: No. I have a motion to make as soon as the contract is placed in evidence, but I haven't anything to add to your statement.

Mr. Harmon: Well, at this time, then, if Your Honor please, will Mr. Licking produce the contract and the requisition for the——



Mr. Licking: Specifications. So far as the requisition for the plumbing supplies is concerned, that requisition was issued at the request of the contractor and it did provide for delivery on October 1.

Mr. Harmon: August 1.

Mr. Licking: August 1. This is a copy of the contract and this, the specifications, which are made a part of the contract.

The Clerk: As one exhibit, Mr. Harmon? [9]

Mr. Harmon: That will be all right. Perhaps——

The Clerk: We will make the contract 1 and specifications 2.

(Thereupon the documents referred to were received in evidence and marked Plaintiff's Exhibits Nos. 1 and 2, respectively.)

Mr. Licking: If the Court please, basing the motion on the statement made by counsel of the fact and upon the documents just introduced, and calling the Court's particular attention to 3 and to 15 of the contract, I object to the introduction of any further evidence in the case. The statement of the facts made by counsel and the provisions of the contract provide in effect that wherever there is a dispute there shall be what counsel outlined, an appeal, and that the decision of the contracting officer shall be final. That is a flat, definite provision of the contract.

The Court: Well, Mr. Licking, taking the theory of the plaintiff's cause of action, that that action

was taken by the officer arbitrarily and capriciously, and may he not go beyond that award if he can prove that it was taken arbitrarily and capriciously?

Mr. Licking: If he is limited to that, Your Honor. I feel he is bound.

The Court: He would be bound by the award unless it had been made by the contracting officer arbitrarily.

Mr. Harmon: If the Court please, that is not entirely the [10] theory of the plaintiff. We have an action here for a breach of contract and that the Government breached its contract and we are suing for breach of contract.

The Court: Is your theory that the Court is not bound by the interpretation placed by the——

Mr. Harmon: By the contracting officer; that is right. And that is the point that we expect to brief for Your Honor.

The Court: I think there is a decision of authority on that.

Mr. Harmon: There may be, but we think our theory is sound and in this case it is thoroughly equitable and just.

The Court: Well, you may proceed.

Mr. Harmon: All right. Now there are a group of letters and a chronological, factual statement that we want to offer and an oral stipulation, if we can work it out. May it be stipulated, Mr. Licking, that this document consisting of nine and a half pages, denominated "Statement of Facts," is a summary of the documents, letters and other docu-

ments that have been interchanged between the parties hereto, and is correct in so far as it does not differ from the actual letters and documents, copies of which will also be introduced, and that this is introduced primarily for the convenience of the Court?

Mr. Licking: Attempted to be a chronological summary of what happened; it refers to certain action and to certain [11] correspondence; in some places it attempts to interpret the correspondence and attempts to describe correspondence with reference to action. That part, of course, the documents themselves would control. Now, the documents which are numbered Exhibits 6-A to 10 I will present at this time. They may be marked; both may be marked as joint exhibits.

Mr. Harmon: That is all right.

Mr. Licking: That is where—I must withdraw that statement, if the Court please. In view of my objection to the introduction of any evidence.

The Court: Well, I will consider the evidence later on as to whether or not it is legally sufficient and——

Mr. Licking: I take it that all evidence now introduced, other than the contract, is being introduced over the objection heretofore noted and with reservation of a move to strike at a later date.

The Court: Very well.

The Clerk: Does it make any difference—that is Plaintiff's 3.

Mr. Harmon: Yes.

(Thereupon the documents referred to were received in evidence and marked Plaintiff's Exhibit No. 3.)

Mr. Harmon: The next document that I wish to offer in evidence is a copy of the appeal and the supporting letters and data attached thereto. [12]

Mr. Licking: Dated when?

Mr. Harmon: May 18; letter of transmittal of May 18 and the appeal itself of May 17, 1945.

Mr. Licking: That will be Exhibit——?

The Clerk: No. 4.

(Thereupon appeal and supporting data were received in evidence and marked Plaintiff's Exhibit No. 4.)

Mr. Harmon: The next document is the decision on that appeal dated July 25, 1945.

(Thereupon decision on appeal was received in evidence and marked Plaintiff's Exhibit No. 5.)

Mr. Harmon: The next document, if the Court please, is the affidavit of E. H. Frick. Mr. Frick is the plumbing sub-contractor and he was here in court at the time this case was first set for trial and by stipulation of counsel, who had been furnished with a copy of the affidavit, we would like to offer this affidavit in evidence as what his testimony would be if he were to be present.

The Court: Very well. No objection. It may be received. That is the affidavit of whom?

Mr. Harmon: E. H. Frick.

(Thereupon affidavit of E. H. Frick was received in evidence and marked Plaintiff's Exhibit No. 6.)

Mr. Licking: I understand that Mr. Lindsay will be present so he can be examined with reference to any statements made to [13] him by Mr. Frick?

Mr. Harmon: Yes, he is here.

Mr. Licking: This will be Exhibit what?

The Clerk: No. 6.

Mr. Harmon: We will call Mr. Nickel now to the stand, if Your Honor please.

THOMAS R. NICKEL

a witness called on behalf of the plaintiff, having been duly sworn, testified as follows.

The Clerk:

Q. What is your full name?

A. Thomas R. Nickel.

Direct Examination

Mr. Harmon:

Q. Mr. Nickel, what was your occupation in the year 1942 and 1943?

A. I was a field office manager on the Benicia project there for E. H. Frick Plumbing Company.

Q. And they were the plumbing subcontractors on that project? A. Yes.

Q. As such, were you present on the project during the time of the construction? A. I was.

Q. Were you present continually on that project? A. During the working period.

(Testimony of Thomas R. Nickel.)

Q. Did you have charge of the books and records? [14]

A. Yes, I did.

Q. Of the project. And were those books and records as of the entries made by yourself and others under your supervision and control?

A. That is right.

Q. Now, directing your attention to this controversy over the installation of the plumbing fixtures, will you state from your own knowledge, so far as you know, just how those plumbing fixtures were received? I mean by that, as to quantities and dates and so on.

A. Well, I take it you don't want to go too much in detail because it is very lengthy.

Q. Give us some of the detail. It won't take long.

A. Well, we had, some of the stuff came in, just a few of them—for instance, refrigerators came. They didn't have the drip pans with them. And when some of the lavatories and the sinks came they didn't have the trim on them. When the toilets came they didn't have the seats on them. They came at different times and in part shipments, delayed shipments and so forth. And our original plan was—we had our units all drawn up, schedule drawn up to go into a house, then install the space heater, the hot water heater, the refrigerator, the gas range, and the toilet, the sink, the trays, everything, and leave that building. The estimate was



(Testimony of Thomas R. Nickel.)

based on that figure, but we couldn't do a single thing that way. And when we tried to accumulate it, [15] we rented a warehouse and held some of them, trying to hold them so that we could get an accumulation and get the fixtures so we could put them on and install the completed unit. The Government——

Mr. Licking: If the Court please, I object to this as argumentative and not responsive to the question which was with reference to how and when the fixtures were delivered.

The Court: Yes. It is not responsive.

Q. (By Mr. Harmon): You have the question in mind now, Mr. Nickel, how and when they were delivered. Do you know when they were, when delivery started?

A. I will refer you to a letter which you have in the file which you can, if you want to, refer to that.

Q. Do you remember the date of the letter?

Mr. Licking: Is the letter not an exhibit?

Mr. Harmon: It is one of the exhibits.

Q. I will give you this copy of that exhibit, Mr. Nickel, and it might help you to refresh your recollection. Maybe you can find the letter you refer to.

Mr. Licking: Class—Class 5-G, a complete chronological statement made by the plaintiffs here.

A. This letter is date of December 1, 1942.

Q. (By Mr. Harmon): And does that set out



(Testimony of Thomas R. Nickel.)

a correct chronology of the date that items were received up to that time?

A. Yes. I will read it if the Court would like.

Q. Go ahead.

A. Because——

Mr. Licking: If the Court please, that is cluttering the record, reading this.

The Court: No. There is no need. It is in the evidence now.

Q. (By Mr. Harmon): You don't need to refer to it and read it, Mr. Nickel. What we would like is a statement supplementing these exhibits and showing what happened, of your own personal knowledge there. May I ask you this question: You know Mr. Geddes? A. Yes, I do.

Q. Do you know what position he had in connection with the matter?

A. He was in charge of the project for the Government there.

Q. Is Mr. Geddes here in the courtroom?

Mr. Licking: No.

Q. (By Mr. Harmon): And do you know Mr. Towers, Ray Towers? A. Yes.

Q. And what was his position there?

A. I don't know his technical title. He was one of the inspectors or men in charge of the work.

Q. And did he give instructions from time to time to you? A. He and Mr. Geddes.

Q. Geddes, also? [17]

A. Yes; usually together.

(Testimony of Thomas R. Nickel.)

Q. Do you know Mr. Ferguson as of that time?

A. No, I had not met Mr. Ferguson up to that time.

Q. Do you remember the names of any of the other officers of the Government who had to do with you during that time?

A. Mr. Kelly was one of the inspectors but he is dead now.

Q. Now, did you have discussions with any of those Government officers regarding these plumbing fixtures and the way they were arriving and the way they were to be handled?

Mr. Licking: That is hearsay, if the Court please, and I can't see its materiality.

The Court: Overruled.

A. Both vocally and by letters which are in file we called attention to the fact we were being delayed and the costs were mounting constantly.

Q. (By Mr. Harmon): I am speaking now of the oral conversations that you had, particularly.

A. Well, one particular thing I had, I think has a bearing on this, the fact that we were definitely ordered by Mr. Geddes, with Mr. Perris present, that we had to go ahead and install these fixtures as they came in, or we would be pulled off the job, and Mr. Geddes said the Government would put their own men there to do the installing.

Q. Do you remember when that instruction was given you?

A. Well, that was around, that particular in-

(Testimony of Thomas R. Nickel.)

stance was around [18] the 19th of November of 1942.

Q. Was that instruction given to you on more than one occasion?

A. Not in those exact words.

Mr. Licking: If the Court please, it is obvious that this one instruction wasn't given on any more than one occasion and that instruction is set out in the exhibit. I can't——

The Court: He is calling for verbal instruction, though.

Mr. Licking: Well, if the instruction is any different than that set out in the exhibit. Has Your Honor the exhibit in mind?

The Court: Perhaps it is weight and accumulation.

Mr. Licking: That is, Your Honor, the exhibit.

The Court: No.

Mr. Licking: It is Exhibit 5-B.

The Court: Well, does the verbal instruction——

Mr. Harmon: Yes. The verbal instruction I am referring to.

Mr. Licking: November 20, 1942; it is stated in quite detail there, refers to Mr. Geddes there.

The Court: Apparently there is no dispute the instructions were made or given?

Mr. Licking: On that date, none.

Mr. Harmon: That is true.

Q. I now ask if there was a similar instruction given on any other occasion, orally. [19]

(Testimony of Thomas R. Nickel.)

A. Not just in those same words. The indication was we had to proceed and we were given a definite time we had to get those fixtures installed, but that particular instance on that date was given that we had to proceed immediately or the Government would pull us off the job and put on their own men.

Q. Was any reason assigned or stated to you by those gentlemen as to why you had to proceed at that time?

Mr. Licking: To which I will object on the ground it is entirely immaterial; the direction was given. What reasons they had for giving it wouldn't seem to me to have any bearing on this case.

The Court: Sustained.

Q. (By Mr. Harmon): Coming back, Mr. Nickel, to the way these fixtures arrived, to your best recollection, when did the first fixtures come?

Mr. Licking: If the Court please, that is set out in the exhibits in the definite statement it is, set out the chronological dates set out in the exhibit. What is the point of this witness? I haven't—This witness.—We have already this correspondence is in the files. This correspondence is before the Court. I haven't any——

The Court: I don't know what is in the chronological statement but if this evidence is in there, why burden the record with the accumulation?

Mr. Harmon: I don't think it is in there. [20]

Mr. Licking: The record shows the delivery dates.

(Testimony of Thomas R. Nickel.)

Mr. Harmon: I wanted to support that with oral testimony.

Mr. Licking: Well, he will testify undoubtedly that these letters state the correct facts?

The Witness: That is true.

Mr. Licking: That is true.

Mr. Harmon: That saves us, Your Honor, on that score.

Q. Now, Mr. Nickel, with regard to——

Mr. Licking: May I suggest, if you wish this identified specifically, Exhibit 6-A, there is a definite statement of delivery dates of the oil heaters and of the other material mentioned.

Mr. Harmon. That is all right.

Mr. Licking: And I imagine that you have examined that. That is what you had in your hand?

The Witness: This letter here.

Q. (By Mr. Licking): You had prepared that yourself? A. That is right.

Q. And your records indicate it is correct?

A. Yes.

Q. (By Mr. Harmon): Mr. Nickel, directing your attention, then, to another phase of this matter, the record of costs, did you keep a record of the costs incurred by reason of the installation of the plumbing? Now, I am speaking of the whole record of costs, not particularly—Let me withdraw the question [21] and put it this way:

Was it your duty to keep a record of the costs expended on that contract?



(Testimony of Thomas R. Nickel.)

A. Yes. We kept a cost accounting breakdown on the different items. We set that up according to the way the bid was put in.

Q. Now, did you keep a record of the costs directly attributable to the installation of these plumbing units?

A. As nearly as possible. Indirect costs, naturally, we couldn't. That had to be determined from the overall picture.

Q. What do you mean by indirect costs?

A. Well, as far as the unit, and as far as installing the heaters and the gas ranges and things, we kept those items separate from all other operations.

Q. Did you prepare at the request of Mr. Lindsay a statement of the total cost of the installation?

A. Yes.

Q. And was that furnished to Mr. Lindsay?

A. Yes. There is a record of that, I believe, on file.

Q. And directing your attention to Exhibit 5-I of Exhibit 3-B, are the figures shown on that page the figures that were prepared by you at the request of Mr. Lindsay?

Mr. Licking: If the Court please, I would like to have the source from which they were prepared.

Mr. Harmon: This is preliminary, of course.

Mr. Licking: Well.

A. I have another one which I gave him that is probably on [22] file, from which these figures were taken, here.

(Testimony of Thomas R. Nickel.)

Q. (By Mr. Harmon): Well, are those—speaking of the figures directly, are those the ones that you gave him, to your best knowledge and recollection?

A. They seem to be. I can check it with my original and tell you.

Q. Will you do that? Have you got your original here?

A. It is in the file here. This is my copy from which his copy was prepared.

Q. Now you are referring to Exhibit 6-A of Exhibit 3-B and those figures are the ones submitted by you to Mr. Lindsay, is that right?

A. That is right.

Q. And where did you get those figures, Mr. Nickel?

A. They were taken from our cost accounting records.

Q. Are they true and correct?

A. As much as it is possible to be, barring any error, and we have not been able to find any.

Q. I will ask you if those figures reflect the full amount of the cost of installing those by reason of the delays and piecemeal installation.

Mr. Licking: To which we object. It calls for opinion and conclusion of the witness.

The Court: Overruled.

A. That is our total. [23]

Mr. Harmon: Read the question again.

(Question read.)



(Testimony of Thomas R. Nickel.)

A. Those figures were taken from our cost accounting records and those reflect the actual cost of these operations which are being considered. They don't contain, however, a number of other incidental charges, indirect charges such as storage on warehouse, telephone and rental of trucks, rental of our equipment, and various items of that sort which have their own bearing and are not included in this.

Q. (By Mr. Harmon): Then, in other words, you are referring to what could be termed as indirect costs?

A. Yes, and they are not contained in here.

Q. And by that do you confine your remark to indirect costs which were directly attributable to this method of delivery and installation?

A. There are, naturally, a number of those things which you just can't—the general overhead.

Q. Have you got any actual figures? Do your records show any actual figures for those added costs?

A. We have them all; our entire costs are all carried down on the different——

Q. What I mean, Mr. Nickel, is this: Do you have any breakdown in actual figures showing——

Mr. Licking: If the Court please, I wish to object to this line of testimony, if I have in mind what counsel is apparently [24] trying to do. The petition before the Court, as counsel stated and as I understood the Court to have stated, is a ques-

(Testimony of Thomas R. Nickel.)

tion presented as to whether or not the action of the reviewing officer in refusing the claim as submitted was or was not an arbitrary and capricious action.

The Court: There is an additional question involved as to whether the officer could pass upon the interpretation of the contract.

Mr. Licking: That is true, Your Honor, but the apparent effort to raise the claim as submitted certainly is not properly before the Court. That is all that is being done here. The witness is being questioned not about the items which appeared but in effect he is being asked if there weren't other items.

The Court: Is that true?

Mr. Harmon: No, Your Honor. What I am trying to get at is this: The testimony would show that this is a very conservative figure in the claim that was submitted.

The Court: Well, you will be confined to your proof as to what goes into the claim that you have submitted.

Mr. Harmon: In the claim that was submitted there was an item for overhead amounting to around 15 per cent. The figures show that the actual direct costs were \$5900, and then in submitting the claim the contractor added an item for overhead and profit which ran the claim up to \$6800. Now, that is the claim [25] as submitted and as it was turned down. We are suing for that

(Testimony of Thomas R. Nickel.)

amount and we are bound by that amount but I am trying to elicit testimony from this witness to show that the difference between the \$5900 and the \$6800, whatever those figures are, is actually additional damage due to increased overhead.

Mr. Licking: Why don't you ask him that question instead of asking something else?

Mr. Harmon: All right. We will ask that question directly. It happens that that figure is not shown in that particular document. It would be in the claim, however.

Q. Mr. Nickel, referring to Exhibit No. 8-A, page 3.

Mr. Licking: Exhibit what?

Q. (By Mr. Harmon): 8-A, page 3 of Exhibit 3-B, I call your attention to the first figure which represents \$5942.67 and which you testified you furnished to Mr. Lindsay.

A. Yes. That is correct.

Q. That is the cost of the plumbing, is it not?

A. Yes.

Q. Now, you notice another item, contractor's profit and overhead, \$891.34. That represents a claim of Mr. Lindsay and Mr. Wilson, the plaintiffs herein, does it not, in addition to——

A. Yes, that is in addition to this.

Q. Now directing your attention to that particular item, Mr. Nickel, do you have an opinion as to the amount of indirect expense that was paid by the contractor and which was directly [26]

(Testimony of Thomas R. Nickel.)

traceable to the fact that the fixtures were delivered piecemeal and required to be installed?

Mr. Licking: If he has such an opinion. The claim has been filed here. It is irrelevant and immaterial.

The Court: Is there a breakdown of that?

The Witness: This was Mr. Lindsay's addition for indirect overhead. I had nothing to do with that. He was asking for my opinion.

Q. (By Mr. Harmon): That is right.

Mr. Licking: I don't think his opinion, if the Court please, is relevant.

Mr. Harmon: I can qualify him on that, Your Honor, if he isn't qualified already.

Q. You kept the cost records?

Mr. Licking: I assume the witness is qualified but it seems to me it is just cluttering up the record. I don't see—that is in.

The Court: Overruled. You may answer.

A. I believe I recall correctly when Mr. Lindsay made that estimate.

The Court: You were asked if you had an opinion.

Q. (By Mr. Harmon): Answer that directly, yes or no.

A. I think that is a very low claim as far as that amount is concerned, as to indirect.

Q. Now, let me ask this question, yes or no, do you have an [27] opinion?

A. Yes.

(Testimony of Thomas R. Nickel.)

Q. All right. Now, what is that opinion. In your opinion, what is the amount of overhead that would be due directly traceable and due to the fact that these items were delivered piecemeal and required to be installed piecemeal?

A. In my opinion, I feel that even \$2,000 would not be excessive.

Mr. Licking: That—may that be stricken, if the Court please?

The Court: Well, I think that is a statement that the amount that is there is proper. Denied.

Q. (By Mr. Harmon): Now, will you tell the Court just how that additional overhead, why it was necessary?

A. Well, other than the——

Mr. Licking: May I ask, that question, why it was necessary, doesn't seem to be relevant.

Mr. Harmon: Well, of course,——

Mr. Licking: What is it you want to elicit from the witness?

Mr. Harmon: I want to show that there was this increased overhead. I want to show that it was reasonably related.

The Court: Why do you say that this increased overhead was attributable to this situation?

Mr. Harmon: That is right. [28]

A. In one particular instance where we were ordered to get our men back on the job when it was raining, and install these—these toilet seats



(Testimony of Thomas R. Nickel.)

came in, when other equipment hadn't come yet so we couldn't complete the building, it meant that we had to have our men go out and carry them; the trucks couldn't get out on the ground, and I told Mr. Geddes they had got bogged down. We had to lay the men off.

Mr. Licking: Now, if the Court please, there is enough of that answer that I can move it be stricken. He was asked if an indirect charge was proper and he is answering about a direct charge.

Mr. Harmon: That is right.

The Court: Yes.

Q. (By Mr. Harmon): Is the indirect——

Mr. Licking: I ask that the answer go out.

Q. (By Mr. Harmon): Were you required to maintain a warehouse and two men?

Mr. Licking: Objected to as irrelevant, and I object to it on the ground it is leading and the witness' statement about what expenditures were required is not subject to cross examination except from his books.

The Court: Overruled.

Mr. Harmon: Go ahead.

A. This is a question regarding the indirect?

Q. (By Mr. Harmon): That is right. [29]

A. Yes. The very nature of those are varied and somewhat intangible but we had rental on warehouses which we had to keep because, according to the specifications of the document, we were supposed to unload and to take the material

(Testimony of Thomas R. Nickel.)

and install it, and coming in different parts that way we had to have a warehouse ready at all times so we could unload the car and put it right in there and then transport it up to the plant. We had to keep our rental on that. We had to keep our truck rental paid and different equipment rentals, and so forth. If these had come so we could have got them installed and got them out of the way, all that additional expense would not have been necessary. There were telephone bills, light bills, and night watchmen and all those various things which are indirect, and they are fairly intangible because you can't definitely say that it cost so much. But I have an opinion, handling the books and paying out the money and so forth, and making the recordation, and so forth, I have an opinion. I know that it added up considerably to a cost other than it would have if they had all come at the proper time and been installed according to schedule.

Mr. Harmon: You may cross examine.

#### Cross-Examination

By Mr. Licking:

Q. Did the contract require that a warehouse be maintained, warehousing be maintained by the contractor, or do you know? [30]

A. Are you asking me? Are you asking me?

Q. I am asking you.

A. So far as I know about the contract, we were to do whatever was necessary to get the——



(Testimony of Thomas R. Nickel.)

Q. I asked you a specific question: Didn't the contract require that? You speak about the expense of warehousing these fixtures which arrived at different times. Let me finish my question.

A. Surely.

Q. And you say that the warehousing is one of the items that went into this indirect expense?

A. That is right.

Q. How did you carry the warehouse on your books?

A. We have entries, entries down for warehousing.

Q. Entries down for warehousing. What other materials did you warehouse besides these?

A. That was all in this warehouse.

Q. Pardon?

A. This warehouse was carried specifically for the Government equipment down near the depot.

Q. Again, now let's be a little more specific about that, was it carried specifically for this equipment?

A. That is right.

Q. These items? Or was it not carried for equipment in general, and didn't your contract require that you maintain it? [31]

A. We had a warehouse on the project for our own material which we supplied.

Q. Yes, and you also——

A. This was a building rented specifically down by the railroad station.

(Testimony of Thomas R. Nickel.)

Q. Was it rented alone for this particular material or wasn't it rented for all of the Government material delivered on the job? All of it?

A. These fixtures; we rented for the Frick Plumbing Company. It had nothing to do with the other subcontractors or general contractors. We rented for these delayed shipments of the Government.

Q. You mean you rented it for the shipments that hadn't come?

A. Yes, so we would have it ready, and parts we were holding and waiting for the others to come.

Q. That was a direct charge?

A. It is a direct, but the additional length of time that we had to hold up the project waiting for them to arrive is over extra charge.

Q. I see. Have you your books on that so I can look at that?

A. The entire books have been submitted.

Q. Have you your book entry on that particular thing? I would like to run over it with you.

A. The books are here.

Q. All right. Can we have them? [32]

(Books were produced.)

Mr. Licking: If you will come down, if you don't mind. You are more familiar with these than I am.

Q. Pick out the ledger entry there, your book

(Testimony of Thomas R. Nickel.)

entry that covers this warehousing which you say was specially for this particular equipment.

The Court: We will take a short recess.

(Recess.)

Q. (By Mr. Licking): Let's see. You were referring to—were discussing Exhibit 6, the letter of the 26th, and we were particularly referring to the item of \$891.34 that is contractor's profit and overhead. Do you have that?

A. Yes, I have.

Q. You have that particular exhibit in mind in front of you, and what we were discussing, you had been asked some general questions with reference to this amount of \$891.34. Now, the amount of \$5,942.27 set up there, that is the amount that the subcontractor, Frick, billed or invoiced the plaintiff here, the main contractor for?

A. That is correct.

Q. That is what you had to pay Frick on account of such estimate of his extra expense on account of this delay, and the figure of \$891.34 doesn't reflect any specific allocation of any part of the various expenses shown in your ledger sheet; it is just an arbitrary 15 per cent taken on this amount of [33] \$5,943?

A. 15 per cent of that total cost, yes.

Q. 15 per cent that the main contractor, the plaintiff here, Mr. Lindsay—

A. Yes.

Q. —and you figured that Mr. Lindsay ought to make on the subcontractor's work? Right?

(Testimony of Thomas R. Nickel.)

A. I didn't get that question.

Q. Well, that is what Mr. Lindsay and you figured that Mr. Lindsay should make on the sub-contractor's work?

Mr. Harmon: Should make on that work?

A. No. That was to cover some of the indirect costs, in other words.

Q. (By Mr. Licking): You never made any allocation of any of those indirect items? You never went over your ledger and took out so much for warehouse expense and so much for telephone and so much for equipment, and put it into that \$891?

A. If we had, I am afraid it would run nearer \$2,000.

The Court: You didn't, though?

A. No.

Q. (By Mr. Licking): Never mind "if you had." You were the bookkeeper for Mr. Frick?

A. That is right.

Q. Not for Mr. Lindsay?

A. No. [34]

Q. And in preparing this claim for Mr. Frick you did go over your ledger sheets and you did pick out the definite items which went into the sum of \$5,942?

A. That is right.

Q. And 27 cents.

A. That is correct.

Q. And those definite items are supported by the ledger sheets which you have?

(Testimony of Thomas R. Nickel.)

A. Yes.

Q. And by certain time cards?

A. Yes.

Q. Which are here. Now, I don't want to take any more of your time than I have to. It is a fact, is it not, that so far as any allocation of the work to the installation of these specific pieces of equipment, that allocation appears, where it does appear, on your time cards?

A. Yes, we have the different——

Q. Just answer my question, not guess what you have. That allocation, wherever it appears, appears on your time cards?

A. That is right. That is where we got it from; and from the ledger sheets.

Q. As a matter of fact, your ledger sheets, itself, as you carried the ledger on the job, the ledger showed no such allocation?

A. The ledger sheet is right here. That is where we got our [35] costs.

Q. I know that is where you got your costs. Did you understand my question?

A. No, I didn't.

Mr. Licking: Read the question.

(Question read.)

A. I would say that is an incorrect statement. I couldn't——

Q. (By Mr. Licking): All right. You have the ledger with you. Will you show me where the ledger showed allocation to installation costs?

(Testimony of Thomas R. Nickel.)

A. Well, we can take——

Q. Well,——

A. —it cost us \$900——

Q. Where is it?

A. \$85.37 to install the oil heater.

Q. Wait a moment. May I see the ledger, see the sheet?

A. Certainly. Do you want me to answer your question?

Q. No. I want you to show the ledger sheet to which you are referring.

A. All right.

Q. Was there any allocation at the time you carried the job on to extra cost on account of delay, or was it just carried on “general”?

A. We had no idea as to what the excess cost would be. Therefore we couldn’t carry it. [36]

Q. Then there was no allocation in your books as to the installation of these particular items, and there is no allocation except such as appears on your time cards. That is correct, isn’t it?

A. There are time cards and our ledger sheets are our total records. There were no other.

Q. Do you understand what I mean by allocation?

A. Yes, I know; that is a definite answer.

Q. All right. That is a definite word. I will ask the question again. Other than the allocation, the specific allocation shown by your time cards, your records do not reflect a specific allocation to cost of installation of the fixtures?



(Testimony of Thomas R. Nickel.)

A. Or cost——

Q. Of over cost?

A. That would be taking our total cost.

Q. You can answer that. Is that or is it not a fact, and then tell me why afterward. That is a fact, is it not?

A. The fact is, I—the cost on here——

Q. Would you answer my question yes or no, Mr. Nickel? I asked you if it isn't a fact your ledger and your books as kept on the job show no such allocation. Is that or is that not a fact?

A. That is not a fact.

Q. Tell me, then, where it shows such an allocation to this overrun because of the failure to— Show me where it shows that allocation. [37]

A. We have our total of oil heaters and all the different equipment set out, every one that the Government furnished. It shows them all separate. Naturally we couldn't total those up. We couldn't carry that along.

Q. I didn't ask what you, naturally, did. I asked you what you did and if so, where. Where is that allocation, if it was ever made?

A. We carried a weekly one each week but we couldn't total it until the job was completed.

Mr. Harmon: I will object to the interrupting of the question.

The Court: I can't hear three people at the same time.

Mr. Harmon: I object to his interrupting the



(Testimony of Thomas R. Nickel.)

witness. He should let the witness answer the question.

The Court: I don't think the witness has answered the question.

Mr. Licking: That is it.

The Court: Objection is overruled. Proceed.

Q. (By Mr. Licking): You understand my question with reference to an allocation?

A. No, I don't. I am trying to answer your question but evidently we are not getting together.

Q. No, we are not getting together because, frankly, I don't think you are answering the question I asked you. It may be because you don't understand it. I will ask it again. In [38] order to present this claim against the United States here, you made an allocation of items from your ledger?

A. That is right.

Q. To this claim; added installation costs. You understand that?

A. That is right.

Q. You made that allocation?

A. That is right.

Q. Now, prior to that time was there any such allocation made in your ledger prior to the time you made up this claim?

A. The allocation from which all those figures were obtained was made each week in here.

Q. Is there any weekly allocation in there to this added expense?

A. I will have to repeat again that those were obtained from these figures.

(Testimony of Thomas R. Nickel.)

The Court: Was that the overall cost without an allocation?

A. That is right, yes, that is right. Yes, that is right.

Q. (By Mr. Licking): The allocation was not made so far as our ledger was concerned until you withdrew or identified certain items there with this claim?

A. You are correct.

Q. Right. Then, at the time you carried this job on you made no such allocation except that which is shown on your time [39] cards?

A. And here.

Q. Well, again, I thought you just said there was no such allocation here at the time you carried on the job.

A. You said for the extras and I said you are right.

Q. Well, well. Then there was no such allocation made in your books until you got ready to make up this claim?

A. The allocation of the cost was made at the time. This other was drawn up subsequent.

Q. What other was drawn up subsequent?

A. Your claim.

Q. Your claim was drawn up subsequent?

A. That is right.

Q. What did you make up the claim from?

A. From these records.

Q. From these records which are here?

(Testimony of Thomas R. Nickel.)

A. Which were made at the time.

Q. And do those records there show any allocation except as of the date you made up that claim? In other words, you just took out, you made this claim up from your ledger?

A. You are correct.

Q. And your ledger, prior to that time, showed no such allocation specifically to this extra cost?

A. Not to extra cost.

Q. All right. And it is extra cost from which the claim is [40] made?

A. They were made from these records.

Q. They were made from the records, but the records themselves show no such allocation. Where did you get the allocation? How do you know which of these records here which you pulled out are attributable to extra time and material necessitated by failure to deliver material?

A. I think you are asking me irrelevant questions, if you would check this claim.

Mr. Licking: If the Court please, I should like to have this witness requested not to argue.

The Court: Yes. Don't argue with counsel. Won't you answer?

Q. (By Mr. Harmon): Do you understand the question? Do you want it read, the question repeated?

The Witness: I think I have answered it.

Mr. Licking: May the question be read, please?

(Question read.)

(Testimony of Thomas R. Nickel.)

A. If you will permit me the time, I will answer that question.

Mr. Licking: Yes. I will be seated. You can have all the time you want to answer.

A. I appreciate that very much. Now, you asked the question as to how we arrived at those figures.

Q. I did not ask the question as to how you arrived at the figures. I asked no such question. I asked you if your ledger [41] showed any such allocation during the time you were carrying the job on.

Mr. Harmon: If the Court please——

Mr. Licking: And you said, “No, it did not.”

Mr. Harmon: I think the witness should be allowed to give his explanation.

Mr. Licking: I want to get an answer, of course, and then we will get the explanation.

The Court: Repeat the question to him.

(Question read.)

Q. (By Mr. Licking): Do you understand the question?

A. Yes. These figures that we have here showed our actual costs. We submitted those to the general contractor and we submitted a bill for the difference between these parts——

Mr. Licking: If Your Honor please, this is entirely nonresponsive.

A. ——the difference between what our costs were and the anticipated cost.

(Testimony of Thomas R. Nickel.)

Mr. Licking: This is not responsive.

A. The difference between represents the amount of the bill.

Mr. Licking: Well.

Mr. Harmon: Now, if the Court pleases,—

Mr. Licking: I would like to have my question answered, if the Court please, and that so-called answer stricken as not responsive. [42]

The Court: I think it is in response. Motion denied.

Mr. Licking: All right.

Q. Where did you get the allocation? What original entry shows the allocation?

A. The allocation we took from our different items, like oil heaters and space heaters and various items that were—

Q. Now, you say—Pardon me. You say the allocation you took. That wasn't the question I asked you and you know that. You made the allocation at the time you submitted this claim?

A. Yes.

Q. Your ledger doesn't show that allocation. Where did you get it?

Mr. Harmon: Are you asking a question or making a statement?

Mr. Licking: No. I am stating what he has already answered over the course of about three-quarters of an hour, that the ledger doesn't show the allocation up to the time he made his allocation when the claim was presented, and I ask where

(Testimony of Thomas R. Nickel.)

he got the basis for the allocation, other than the time cards.

Mr. Harmon: Let him answer.

Mr. Licking: All right.

A. Each week, as we made our payroll entries and so forth, we made our entries and our costs on our ledgers here. Every week our payroll went on and our other overhead, they were all [43] broken down here. At the time that this claim was made, we took the items that were charged up directly to installing the oil heaters and the gas ranges and other things that the Government furnished, and that is where our figures were obtained. Now, as to the extra for the \$5,900 and some odd dollars, that represents a difference between our actual cost and the cost that we estimated should have been a normal installing cost had they arrived all in one time or if we hadn't been forced to go out and install them piecemeal.

Q. (By Mr. Licking): Well, O.K. Where again, is your original entry allocating costs to the specific installation of these items?

A. It is right here.

Q. Is that your original entry or is your original entry your time card?

A. This is our original entry here.

Q. Where did you get the data that is in there?

A. We got them out of our payroll, our checks and accounts payable and pay cards.

Q. As a matter of fact, isn't the only original



(Testimony of Thomas R. Nickel.)

entry that you have furnished to me or that you have in the court here now with reference to those allocations, your time cards?

A. The time cards and our payroll records which we made.

Q. Your payroll reports are taken from time cards, are they not? [44]

A. That is right.

Q. All right. But your time cards are the original? A. Yes, that is the original.

Q. The original allocation?

A. That is right.

Mr. Licking: Well, that is all.

#### Redirect Examination

Q. (By Mr. Harmon): Mr. Nickel, it is true, is it not, that these time cards and ledger cards and payroll records have been furnished to the Government and you have yourself given a lot of time to going over these with the Government and——

A. That is right.

Mr. Licking: That is a fact, and I thank him very much.

Mr. Harmon: That is all.

Mr. Licking: I would like to have those ledger sheets marked for identification, and the time cards also.

Mr. Harmon: Yes. I should like to offer the ledger sheets and time cards in evidence, if Your Honor please.

The Court: Any objections?

Mr. Licking: Oh, none, if the Court please.

The Court: They may be received.

Mr. Licking: Other than the general objection.

(Thereupon the ledger sheets and time cards were received in evidence and marked Plaintiff's Exhibit No. 7.)

The Court: We will recess until 1:30.

(Thereupon an adjournment was taken until 1:30 P.M.) [45]

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### Afternoon Session

Friday, October 17, 1947, 1:30 o'Clock

### RAY T. LINDSAY

was called as a witness on behalf of the plaintiff, and having been duly sworn, testified as follows:

Q. (By The Clerk): What is your full name?

A. Ray T. Lindsay.

### Direct Examination

Q. (By Mr. Harmon): Mr. Lindsay, you are the brother of Claude T. Lindsay who is one of the plaintiffs in this action are you not?

A. Yes, sir.

Q. And what position did you hold with reference to your brother and Mr. Wilson, his partner, in this contract which is the subject matter that we are discussing here?

(Testimony of Ray T. Lindsay.)

A. I was their manager on the project.

Q. You were the manager on the project up at Benicia?           A. That is right.

Q. Did you have personal charge of the project for them there?           A. Yes, sir.

Q. That was back in 1942, wasn't it?

A. That is right.

Q. Will you tell the Court what your experience was at that time with reference to building contracts of a general nature?

Mr. Licking: He is qualified. [46]

Mr. Harmon: You will stipulate so?

Mr. Licking: Yes.

Mr. Harmon: All right.

Q. Now, directing your attention to the particular matter in controversy, do you recall making the requisition for the delivery of the plumbing items that were to be furnished by the Government?

A. Yes.

Q. And that they were required by you to be delivered August 1, 1942?           A. Yes.

Mr. Licking: Required or requested?

Mr. Harmon: Whatever the language of the requisition is is what I meant.

Mr. Licking: Requested rather than required.

Q. (By Mr. Harmon): Were those items delivered at that time as requested?

A. No, they were not.

Q. Will you state briefly to the Court how they were delivered?

(Testimony of Ray T. Lindsay.)

Mr. Licking: Now, if the Court please, that——

Mr. Harmon: Withdraw the question.

Mr. Licking: You have—it would be just—you have the exhibit.

Mr. Harmon: It would be cumulative.

The Court: Yes. [47]

Q. (By Mr. Harmon): You recall how they were installed, do you not, Mr. Lindsay?

A. Yes.

Q. And without rehashing the story of what that was this morning, it was piecemeal, at the request and order of the representatives of the Government?

A. Yes.

Q. Did you personally have any discussions with Government representatives in regard to that matter?

A. Yes, on several occasions.

Q. On several occasions. With whom did you talk?

Mr. Licking: Time, place and parties present, if the Court please; foundation of the statements of the conversation.

Q. (By Mr. Harmon): Did you have that——

The Court: One question at a time.

Q. With whom did you talk?

A. I talked with Mr. Powers and Mr. Geddes.

Q. (By Mr. Harmon): Where were these conversations had?

A. In the offices of the—in their offices on the project. And on the site, I would say.

Q. And do you recall approximately when the first of the conversations was?

(Testimony of Ray T. Lindsay.)

A. Yes. Early in October or the middle of September, some place.

Q. Will you state what the substance of that conversation was [48] as near as you can recall it?

Mr. Licking: With whom?

Mr. Harmon: Mr. Geddes and Mr. Towers.

A. Towers, yes.

Q. (By Mr. Harmon): Were they together?

A. Yes, We had received the lavatories and had only received the trim for 42 sets out of 200. We had installed the trim on these lavatories and had them lined up outside of our shed waiting for the balance of the trim to be received so we could continue making the installations, and one morning I was called in to their office and they said that Colonel So-and-so of the Benicia Arsenal had been over and he was unhappy to see plumbing on the site there that hadn't been installed. And I told him that we preferred to wait until we had received all of the trim or all of the plumbing fixtures for a unit, so to speak, before we made installations, and he said, "Well, they wanted those buildings available, wanted the plumbing kept up right up to date so that those buildings would be available at the very shortest moment after the last item had been received." And I explained to them that that certainly was not an orderly way to do it, and a very expensive one as far as we were concerned, and told them that we would certainly have to be compensated for doing it in that way, and they told me that

(Testimony of Ray T. Lindsay.)

at the time, proper time, they would give me their personal assurance that we would be compensated for expenses [49] that we would have, but the main objective was to keep that project right up to the minute.

We went ahead and installed those immediately on their word, the 42, and then at different times during, as different items were received, we were requested by them to install these items immediately upon receipt, although we protested verbally and by letter regarding that method of making installation.

Q. All right. Now, had those items been delivered as requested by you, in what way would you have installed them?

A. We would have waited until we had all the items for one unit. Then we would have delivered it, had it delivered to the unit, and then a plumber would have gone in and completed the unit and he would have been finished.

Q. I see. Do you recall whether or not anything was said to you by Mr. Geddes or Mr. Towers as to what would happen if you didn't follow their instructions to install their units?

A. Yes. They told us that——

Mr. Licking: May I have this more definite? When was that?

Q. (By Mr. Harmon): Do you recall the time that they told you, talked about that particular thing, Mr. Lindsay?

A. Yes. On about the 19th or 20th of November,



(Testimony of Ray T. Lindsay.)

Mr.—it was Friday or Saturday, as I recall; probably Friday—I was called in to San Francisco. It had been raining for several days. I had returned to San Francisco and the plumbers had been released [50] because there was nothing more for them to do, and I was called by Mr. Frick on the phone. He told me Mr. Geddes had required them to—or that some toilet seats had been received and he requested that Mr. Frick call his plumbers back and have those toilet seats installed immediately. I called Mr. Geddes on the phone and told him that that was a very expensive way to operate and I couldn't see how that anything was to be accomplished after the toilet seats had been installed because there were so many other items in the houses that rendered them unfit for occupancy and he then reassured me that they had been told and instructed to see that the job, that these plumbing fixtures were installed as they were received, and for us to do it and that they would take care of the additional cost at a later time.

So I called Mr. Frick, or Mr. Nickel, and told him to go ahead and do it. He called the plumbers back from Oakland. They worked over Saturday, Sunday, holidays and worked early and late and got those items installed. And, of course, that was all at terrific expense to us and very unreasonable, as far as we were concerned.

Q. Now, Mr. Lindsay, during that conversation—

(Testimony of Ray T. Lindsay.)

Mr. Licking: I suppose this is interrogation of argument and one thing and the other, of very little influence on the Court; certainly improper; should be stricken.

The Court: Proceed. [51]

Q. (By Mr. Harmon): Mr. Lindsay, during that conversation was anything said to you what would happen if you didn't go ahead and install that trim and so forth as it was received?

Mr. Licking: He is testifying, counsel, as I understand it; his testimony is to the conversation that somebody had with Mr. Frick and what Frick told him about what somebody told Frick.

Mr. Harmon: I think the question is proper, your Honor. My question, previous to the last answer, was directed to that specific item and then the witness gave his answer, but he didn't cover that particular point and I am trying, directing his attention to that particular point.

Mr. Licking: Well, I will withdraw the objection.

The Court: Was anything said in that regard?

A. Yes. At that time, I think after I returned to the project, immediately following that, we were told, or I questioned, I think, Mr. Geddes regarding his conversation with Mr. Frick that they would bring their plumbers in and charge us for it, and he indicated that that was what they had decided anyway.

Q. (By Mr. Harmon): Now, Mr. Lindsay, what

(Testimony of Ray T. Lindsay.)

is the customary good plumbing practice with regard to installations of that nature and the large projects?

Mr. Licking: If the Court please, I will object to what the proper custom is. The contract——

The Court: Overruled. [52]

Mr. Licking: Exception.

A. Well, to make the installations of all the plumbing fixtures at one time.

Q. (By Mr. Harmon): And is that for reasons of economy as well as other reasons?

A. Yes.

Q. Will you state whether or not the piecemeal installation had any effect on making the unit available more rapidly for occupancy?

A. Yes, very much so.

Q. Now, Mr. Lindsay, directing your attention to Exhibit 10-C of 3-B, page 3, which is a copy of a bill received—a copy of a bill from the E. H. Frick Plumbing Company, will you tell the Court what that is?

A. This is a bill which they rendered to us setting forth the additional charges which they required of us by reason of the installing of the plumbing fixtures at the convenience of the Government rather than as they had contemplated.

Q. Now, does the figure—what was the figure? \$13,047.27—represent?

A. That represents the total labor cost for installing, for handling and installing the mass pur-

(Testimony of Ray T. Lindsay.)

chase of items which were furnished by the Government.

Q. Was that amount paid by you to the E. H. Frick Plumbing Company? [53]

A. Yes, it was.

Q. Now, directing your attention to the next items, handling and installations, costs as originally estimated, \$7,000—200 units at \$35 each, and on the community building, \$105; total, \$7,105. Will you explain to the Court what that figure represents?

A. That represents his estimate for handling and installing these items had they been—or had he been able and been permitted to install them in an orderly and practical way; had he been permitted.

Q. Now, Mr. Lindsay, coming to your own opinion and judgment based upon your experience as a contractor, have you an opinion as to what the reasonable cost of installing those items would have been had they been delivered and you been permitted to install them as a unit at one time?

A. Yes.

Q. Will you tell the Court what that opinion is?

A. It is that this item of \$35 would have been ample.

Q. And was that \$35 per unit?

A. Per unit, yes.

Q. I take it, then, your opinion is that the total of that item, \$7,105, is a reasonable amount that such cost would not have exceeded?

A. Yes, it is.

(Testimony of Ray T. Lindsay.)

Q. Now, tell the Court what the other figure there is, the [54] difference between the \$13,000 and the \$7100-odd dollars.

A. The difference represents the additional charge which Frick incurred by reason of making installations as he did over what he had estimated and could have done it for under normal conditions.

Q. That is the amount you are claiming as damage for having paid out to E. H. Frick Plumbing Company?

A. That is right.

Q. Now, directing your attention to another exhibit, if I can find it, which is Exhibit 8-A on page 3 of 3-B, purporting to be an invoice from Claude T. Lindsay and Martel Wilson to the United States, it carries over the amount of damage which you had paid to the Frick Plumbing Company, is that correct, \$5942.29?

Mr. Licking: You mean the amount of the alleged——

Mr. Harmon: Yes. Amount alleged.

A. Yes, it does.

Q. (By Mr. Harmon): Now, will you explain to the Court this other item, \$891.34, which is labeled "Contractor's Profit and Overhead"?

A. Yes. That represents the contractor's profit——

Mr. Licking: If the Court please, it seems to be self-explanatory.

The Court: I would think so.

Q. (By Mr. Harmon): Let me ask you this



(Testimony of Ray T. Lindsay.)

question: I think [55] that is probably right. Have you suffered any damage in addition to the amount that was paid by you to the E. H. Plumbing Company?

Mr. Licking: If the Court please, whether or not any such damage was suffered is not the subject of this action.

The Court: I wouldn't think so, either. It is the amount of the claim.

Mr. Harmon: Yes. This is in the claim and I am—I want to cover that.

The Court: You want to find out from him how he arrived at that figure?

Mr. Harmon: Yes.

The Court: All right. Ask him.

Q. (By Mr. Harmon): All right. How did you arrive at that figure?

Mr. Licking: If the Court please, how the figure was arrived at—it is stated, it is read—read it again, counsel, what it says.

Mr. Harmon: Overhead.

The Court: That doesn't explain how it was arrived at. Go ahead and answer the question.

Q. How did you arrive at that figure?

A. This represents 15 per cent which the contractor was entitled to receive on all extra work which he was required to perform in connection with the government contract. [56]

Mr. Licking: That is, entitled to receive under the terms of the contract?



(Testimony of Ray T. Lindsay.)

The Witness: Under the terms of the contract.

Mr. Licking: Well, if the Court please, then I move the answer be stricken as inapplicable to the position announced here, that is, damage, if they were claiming the contract, which they say they were not.

That is an item which, according to the statement of the witness, was submitted for something alleged to be due under the contract. Now counsel has announced to the Court that what he was claiming here was damages for breach of the contract, not the amount due.

The Court: It will stand in the evidence as an explanation of the figure and how he arrived at it. Motion denied.

Q. (By Mr. Harmon): Now, Mr. Lindsay, will you state whether or not in your opinion there was any additional overhead, any overhead paid out by you—by you, I mean the plaintiff in this action—which was not included in the amount paid by you to the E. H. Frick Plumbing Company?

Mr. Licking: To which I object on the ground it is immaterial.

The Court: Something beyond the claim?

Mr. Harmon: No, no. I merely want to segregate, if your Honor please, in this claim as it was filed and the plaintiff was then proceeding on the theory of trying to get adjustment [57] under the contract. He has got an item——

Mr. Licking: That is stipulated, counsel, that

(Testimony of Ray T. Lindsay.)

the claim was provided not for damages but for an adjustment under the contract?

Mr. Harmon: Yes. He has got an item of overhead and profit, 15 per cent of the amount of the claim. Now I merely want to elicit from the witness a breakdown between overhead and profit, because under our theory of damages I concede we are not entitled to any profit but we would be entitled to any overhead costs.

Mr. Licking: Well, his statement is that he based that on the contract and the contract allowed 10 per cent profit.

Mr. Harmon: I am going further than that. I have explained the exhibit. Now I seek to bring out from the witness, if there was any expense from it, what.

Mr. Licking: I will reserve the objection.

The Court: I will permit you to do so. Proceed.

Q. (By Mr. Harmon): Do you have the question in mind?

A. I believe so. May I have the question read?  
(Question read.)

A. Do you mean any additional overhead or charges or costs?

Mr. Licking: If the Court please, it seems to me——

Q. (By Mr. Harmon): Costs.

Mr. Licking: —the condition, that should refer to the claim; any amount of overhead paid other than that claim. [58]

(Testimony of Ray T. Lindsay.)

The Court: It is included in the claim?

Mr. Harmon: That is true.

Mr. Licking: Well, then, I have no objection to the direct question, what is in that claim.

Q. (By Mr. Harmon): Let me put it this way, Mr. Lindsay: Aside and apart from the damage of \$5900-odd which you claim by reason of payment to Frick Plumbing Company, was there any other damage attributable, in your opinion, to the way the Government delivered and required these items to be installed?

Mr. Licking: That call, of course——

The Court: Why don't you ask him what that item is, the \$800 that you mentioned?

Mr. Harmon: I have already got that in evidence.

The Court: Eliminating the profit.

Q. (By Mr. Harmon): Eliminating the profit, how much would the balance be on that?

A. I would say the overhead would probably run us around 10 per cent on that job.

Q. Now, referring——

Mr. Licking: I would like to have the answer stricken, if the Court please, as non-responsive. The question wasn't what the overhead on the job ran but what that item represented. That question hasn't been answered.

The Court: What do you mean? That is the overhead on the excess cost? [59]

A. That is right.

(Testimony of Ray T. Lindsay.)

Q. (By Mr. Harmon): 10 per cent of \$5900-odd?

A. That is right.

Q. Is that based on your general experience, on contracting business, as to what overhead——

A. Well, on this particular job.

Q. And on this particular job?

A. Yes. That would be very nominal.

Q. Reverting once more to your testimony as to the amount that would have reasonably covered the installation, \$35 per unit, would that cover both hauling and distribution of the materials to the units, as well as installation of those units?

A. Yes, it should be ample for both.

Q. Have you ever been paid any part of that claim?

A. None.

Q. Oh, have you performed all of the terms and conditions of that contract? I mean, the plaintiff, Mr. Lindsay?

A. Yes.

Mr. Harmon: That is all. You may take the witness.

Mr. Licking: I object to the answer as opinion.

#### Cross-Examination

By Mr. Licking:

Q. Your original claim in this matter was made to Mr. deLappe, the supervising architect, was it not?

A. I didn't get the first part of it.

Q. I say, your original claim in this matter, that is, your [60] original statement of the amount you then considered due under the contract, was made first to Mr. deLappe, the supervising architect?

(Testimony of Ray T. Lindsay.)

A. I think so, yes.

Q. And the claim which you made to him, that is, the items you set up there and the items you subsequently thought up, have been the same?

A. Yes.

Q. And are still the same through now, up to the time you appealed finally from the last decision of the officers?

A. That is right.

Q. Now, do you recall whether ever at any time in your claim you ever referred in your claim to any direction to install piecemeal, accompanied by a threat to put other plumbers on the job, except the conversation about November 20?

A. I don't think I ever wrote.

Q. That was the first statement of anything of that sort?

A. I think so, yes.

Q. In writing. And that is the statement appearing in 6-A here which was filed on April 26 with Mr. deLappe and that sets out the delivery dates, also, doesn't it?

A. Yes, I think so. Yes.

Q. Maybe, probably if you had that when I am talking about it—that is Exhibit 6-A.

Mr. Harmon: Which page of that exhibit are you referring [61] to?

Mr. Licking: Well, Exhibit 6-A, the first page: April 26, 1943, the first claim that went to the architect.

Now, that was the claim concerning which you haven't testified but Mr. Nickel did this morning,



(Testimony of Ray T. Lindsay.)

that there was a discussion about \$35 as the basis. That was the first claim. And then the matter goes on through the various exhibits and there is never any mention in writing by you of any threat or of any direction that if you didn't install the units piecemeal they would put someone else on the job, until the reference to the November 20 date in Mr. Frick's claim when he speaks of Geddes telling him to proceed with the installment of certain materials or they would put other plumbers on the job, and that is the direction to which you have referred in your testimony, and that, as well as your recollection is, is the date that that direction was made, November? A. Yes, I think that is right.

Q. Now, with reference to this item of some \$891, appearing in Exhibit 8-A, page 3, at the time you presented that claim, why, you apparently just multiplied the sum you had to pay Frick, \$5,942.27, by 15 per cent and got the \$891.34?

A. That is right.

Q. That was your method of arriving at it?

A. Yes.

Q. The basis of that claim at that time was that under the [62] contract you were entitled to 10 per cent over your costs and you figured that 5 per cent would take care of the other expense items in that connection? That was what Mr. Nickel just testified to this morning and that is the case, isn't it?

A. We just applied the 15 per cent without any attempt——



(Testimony of Ray T. Lindsay.)

Q. Where did you get the 15 per cent?

A. That was the customary per cent which we had applied on all change orders up to that time.

Q. What did the contract call for?

A. I think 15 per cent.

Q. Did the contract not provide 10 per cent?

A. I don't recall. I think it was 15 per cent.

Q. But at any rate, that kind——

A. We followed the same procedure as we have had on all previous change orders.

Q. That was a claim under the contract?

A. That is right; for additional work performed.

Q. As a matter of fact, it was profit, wasn't it?

A. Well, that was the profit and overhead and profit on additional work performed. Whenever we had a change order for the Government we supported it by a breakdown in which, to which was added this 15 per cent.

Q. Frick was a subcontractor then?

A. That is right.

Q. And your subcontractor was Frick, as I understand it, from [63] your—from the statement ascribed to you in the various exhibits. You had a cost plus contract with Frick?

A. That is right.

Q. That is, Frick was entitled to his actual costs and some figure which is represented in what he turned in to you, that is, the total overall cost of some \$13,000 for the work that Frick did?

A. That is right.

(Testimony of Ray T. Lindsay.)

Q. You yourself did none of that work?

A. We did none of it.

Q. You didn't do any of it, so this \$891.34 is, so far as it appears here, a figure that you got from applying the usual figure for extra work under your contract, right?

A. That is right. Of course, our overhead also went on as long as the contract went on and of course that is——

Q. And the duration of the contract going on wasn't determined by the fact that these particular items were or were not delivered to the contract as a whole? It had other factors that held it up, did it not?

A. There were, but this was the principal one.

Q. This was the principal, but think about the matter of delivery of lumber, for instance. Just think back over it.

A. We had no delay for lumber or anything else comparable to this.

Q. You didn't have any delay for lumber? [64]

Mr. Harmon: If Your Honor please, counsel has the habit of interrupting the witness.

Mr. Licking: Yes. I am sorry. I apologize for it.

Q. You are quite sure you didn't have any delay for lumber?

A. I didn't say—we may have had some delay; we had delay on plywood and we had delay on lumber; we had delay on priority. We received no priority. We went ahead and worked for three weeks

(Testimony of Ray T. Lindsay.)

or a month without priority, as an evidence of our willingness to get the project done.

Q. Did you, you were just saying to the Court that the main delay in the construction in this case was the failure of delivery of these particular relatively few items?

A. I say it was the principal.

Q. It was the principal?

A. Principal source of delay, yes.

Q. Now, calling your attention now to September 5, 1942, and your attention particularly to 5-A, Exhibit 5-A, that was your first written request for an extension of time or any consideration on this job, as I get the record. That is correct, isn't it, your first written request?           A. That is right.

Q. And that was September 5, 1942?

A. That is right.

Mr. Licking: Now, as I understand the situation, we have stipulated that these fixtures, the delay in furnishing which [65] is the basis for this action, were requested by the contractor to be delivered August the first?

Mr. Harmon: That is right.

Q. (By Mr. Licking): And it was on the basis of this request that you got an extension of the contract time, did you not?

Mr. Harmon: What request are you speaking of?

Mr. Licking: Their request of September 5.

A. Our answer to that was that they could not

(Testimony of Ray T. Lindsay.)

consider an extension of time at that time but finally, after the whole contract was over, why, they did arrive at an extension of time to cover the whole thing but their letter to us in answer to this——

Q. This is September 5, 1942, the date of this letter. It just occurs to me that you don't make any claim there on account of the failure of delivery of this particular material here.

A. We hadn't received but very little of it on September 5.

Q. It was due to be delivered August the first, was it not?

A. That is right. This was simply not for damages, just for extension of time. It had no connection with damages.

Q. But at that time, at any rate, you didn't mention this failure of delivery of material to which you now say it was the principal cause of delay in the final completion of the job?

A. No. We mentioned only the items that were concerned with the extension of time. [66]

Q. I say, you didn't——

The Court: Just answer the question. You made no——

A. I made no mention of any damages in this letter, no. I did mention, however, that we were waiting for plumbing fixtures which would contribute to the extension of time.

Q. (By Mr. Licking): But at that time you

(Testimony of Ray T. Lindsay.)

couldn't complete the houses, you didn't have the lumber for the houses?      A. No.

Q. What difference at that time did it make if you had plumbing fixtures or not?

A. At this time the project was very far along. We hadn't known, but we simply cited the shortages which had occurred which would justify our asking for an extension of time.

Q. But at that time if you had had the plumbing fixtures at that time, you couldn't have installed them anyway, could you?

A. Oh, yes. We could have started a good many of them.

Q. You could have started a good many of them, but as a matter of fact, you didn't have half of the houses completed?

A. Well, we had some houses completed.

Q. You had some houses completed but that would have been piecemeal?

A. Yes, we would have had to install them piecemeal. That is right.

Q. In other words, at this time if you had had the plumbing fixtures you could not have installed them en masse at that time? [67]

A. That is right.

Mr. Licking: That is all.

Mr. Harmon: Is that all?

### Redirect Examination

By Mr. Harmon:

Q. Mr. Lindsay, the houses that you had com-



(Testimony of Ray T. Lindsay.)

pleted, they were entirely completed, were they not? So that you could have installed, if you had had the plumbing fixtures you could have installed them complete for each house?

A. Yes. We had the houses completed far enough long, for example, on September 22, where we could have installed—we would have completed 84 installations as of that time, and in our letter of September 22 we bring that out.

Q. Isn't it true that the big evil that you complain of here is the fact that you couldn't install a given house completely because only part of the fixtures for a house came at a time?

A. That is right.

Mr. Licking: That is a leading question.

Mr. Harmon: Yes, it is. I am sorry.

Mr. Licking: I don't know why you should feel sorry. It was nicely done.

Q. (By Mr. Harmon): Now, I direct your attention, Mr. Lindsay, to this same letter to which counsel has referred you and particularly to the paragraph at the very bottom of the page 1.

Mr. Licking: Where is this, counsel?

Mr. Harmon: Exhibit 5-A, page 1. [68]

Q. And also, does that refer to the plumbing items?

Mr. Licking: What it refers to would be explained by the quotation from the letter itself.

Mr. Harmon: I am merely pointing this out because you didn't seem to be able to find any reference to these particular shortages.



(Testimony of Ray T. Lindsay.)

Mr. Licking: You are asking his opinion about what something refers to. I have no objection to your reading it.

Mr. Harmon: All right.

Q. Will you read that particular paragraph beginning at the bottom of page 1 in this letter?

A. This does not apply to the plumbing fixtures.

Q. All right. Then refer to page 3 of the same letter, the fourth paragraph from the bottom. Does that refer to the plumbing fixtures?

A. That is right.

Q. Please read that.

A. "At the present time the plumber is awaiting delivery of plumbing fixtures which are being furnished by the Government. He is being delayed in making installations in units ready for them."

Mr. Harmon: That is all.

Mr. Licking: I have no questions.

Mr. Harmon: The plaintiff rests, Your Honor.

Mr. Licking: If the Court please, at this time I move to [69] strike the evidence that has been introduced either under the theory that he has introduced it, to prove what has been introduced in evidence, a claim for services under the contract, or what has not been introduced in evidence, a claim for damages. The contract itself which is in evidence and on the basis of the contract as the basis for that motion. I won't argue the motion any further because there is on both points some—I wouldn't say conflicting, but some confusion in the

cases, and I believe that the case is one which probably should be presented to the Court and briefed.

The Court: Motion denied.

Mr. Licking: Yes. May I have an exception? May I have the Court's indulgence for about two minutes?

The Court: You want a recess?

(Recess.)

Mr. Licking: If Your Honor please, I believe I will be able to conclude the government case with one witness. There is a stipulation that I have in mind.

Counsel, you remember the other day we looked at these daily inspection reports. Mr. Geddes was there and said it was his signature on the reports where they were signed. I propose to use these as the basis—I couldn't get Mr. Geddes today. I have no question about that.

Mr. Harmon: Can we put these on?

Mr. Licking: Oh, yes. This morning Your Honor spoke [70] about certain requisitions, mass purchase requisitions, those covering the particular material, the defendants were to supply, which is the basis of this action. These four——

The Court: They are offered?

Mr. Licking: ——are proper exhibits. Well, I understand that the plaintiff is offering them, Your Honor.

Mr. Henderson: Yes. They should be in the plaintiff's case.

The Court: Very well.

(Thereupon the requisitions referred to were received in evidence and marked Plaintiff's Exhibit No. 8.)

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F. ALLEN TAYLOR,

called as a witness on behalf of the defendant, and having been duly sworn, testified as follows:

The Clerk: What is your full name?

A. F. Allen Taylor.

Direct Examination

By Mr. Licking:

Q. Mr. Taylor, you have been in court during the taking of testimony in this case and are familiar with the contract referred to?

A. Yes, sir.

Q. You know Mr. Lindsay and his firm or partnership, the plaintiffs here? A. Yes. [71]

Q. And also know Mr. Nickel who testified?

A. Yes.

Q. Were you yourself concerned with the matter of the contract referred to? Were you employed in and about the contract in and about the project?

A. Not on the project. I was employed in the regional office.

Q. In the office of what agency?

A. Of the Federal Public Housing Authority.

Q. In what capacity?

A. I was a construction engineer in the claims section of that agency.

(Testimony of F. Allen Taylor.)

Q. As such, was it part of your duties to pass on the claims concerned with contracts such as the instant contract?

A. I prepared findings for the contracting officer.

Q. With reference to the particular claim here involved, did you prepare the findings in that case?

A. Yes, that is correct.

Q. Did you examine the supporting data furnished by the claimant? A. I did.

Q. At that time what was furnished, if you recall?

A. There was nothing—the claim was—beside the claim itself, there was nothing in the way of supporting data submitted by the contractor.

Q. Calling your attention now to Exhibit 6-A?

A. Yes.

Q. And referring particularly to page 5 of that exhibit 6-A? A. Yes, sir.

Q. That was the only data submitted at that time by the contractor?

A. Yes. That is the statement from the plumbing company to the prime contractor and the prime contractor's statement to the Government.

Q. Which is Exhibit 6-B?

A. Yes. Those exhibits or items accompanied the claim and that is what was submitted.

Q. There was not at that time furnished any supporting ledgers or any supporting time cards?

A. No, no time cards or ledgers was submitted with the claim in supporting of these figures.

(Testimony of F. Allen Taylor.)

Q. In other words, the claim was merely the invoice from the subcontractor to Lindsay, the main contractor, and Lindsay's computation of his profit and overhead added to that?

A. Statement to the Government; that is correct.

Q. Now, am I correct in stating that the general theory of the claim was an overrun on estimated cost of plumbing installation?

A. That is what the——

Q. General?

A. What the statement shows. [73]

Q. Generally speaking, the claimant stated and supported by Frick that Frick's original contract had been based on an idea of \$35 per unit for the installation of plumbing fixtures and that that was based on what he assumed to be a general custom and assumed to be an agreement that such fixtures would be delivered so that they could be installed in one trip?

A. Yes.

Mr. Harmon: Just a moment. I object.

Mr. Licking: I am just trying to summarize.

The Court: He says that the only data is what is before him. There is no occasion for any further construction to be put on it.

Q. (By Mr. Licking): Now, you made a computation with reference to that claim?

A. That is right.

Q. And in making that computation, did you have other data before you other than that submitted by the contractor?



(Testimony of F. Allen Taylor.)

A. Yes. We have had the regional office records which consisted of copies of the plumbing subcontractor's payrolls and we had copies of daily reports made by the architect, reported daily on the progress of the job.

Q. And the supervising inspector?

A. The supervising inspector, the architect.

Q. That daily report of the supervising of the work, to show what the contractor, subcontractors were doing on the job as [74] observed by the inspector?

A. That is correct. It is in the form of a diary.

Q. Is this that?

A. This is a set of the supervising architect's daily reports.

Q. Now, I note from Exhibit 6-A——

Mr. Licking: For convenience, Your Honor, I have given the witness a copy of the exhibit so that he may have that copy and refer to it in order to shorten the matter.

Q. Now, referring to 6-A, we have first there a statement of delivery dates beginning on page 1; that is, the oil heaters were delivered on August 4, and so on, with the other items.

A. Let's see. Page 1?

Q. Page 1 of 6-A.                      A. That is right.

Q. Now, with the inspection reports you have and the data submitted by the claimant, you state that you made an estimate or what was it you termed your findings?



(Testimony of F. Allen Taylor.)

A. I made my estimate from the actual copies of the payrolls which we had in our office and comparing that with the number of men and so forth that the inspector said were on the job on these various days and making a schedule as to what these various number of plumbers were doing on those days that they were on the job.

Q. The inspector's reports showed that?

A. The inspector's reports showed that. [75]

Q. Now, from that report what difference, if any, did you evolve between the statement submitted by the contractor and your findings?

A. May I refer to a copy of the figures that I used in my——

Q. Surely. That is, I haven't any objection. I guess counsel hasn't?

A. This is—I took the entire plumber's payroll which was approximately \$78,000. I had that together with—And I divided that into three periods. I took the first 13 payrolls which was up to the week ending September 23. That is approximately when the plumbing fixtures were first delivered. And that part of the plumbing subcontractor's payrolls was \$54,000 up to that date. You see, in analyzing his payrolls, he did a good deal of other work besides install plumbing fixtures. Installing the plumbing fixtures was a small portion of the \$78,000. He had a lot of site work and installation of water system and stoves and some sheet metal work, I think, which all bears out by comparing the actual payrolls with the inspector's reports.

(Testimony of F. Allen Taylor.)

Q. You first began to consider payrolls on this installation as of September 23? A. Yes.

Q. Now, in that connection, I call your attention to Exhibit 6-A, page 1 of Exhibit 6-A.

A. Yes. [76]

Q. The first of these materials which have caused this controversy were the oil heaters. They were delivered August 4. I note the statement there—and this is the statement of the claimant—that that installation started September 26?

A. September 26.

Q. Where did you arrive at the figure of September 23? Did you feel there may have been some work before the 26th?

A. Well, the inspector stated in his diary of September 21 that a foreman and two plumbers started installing lavatories—no. Started to install fixtures on that date.

Q. Started to install fixtures? He didn't say what kind of fixtures?

A. Yes, he did. He says so exactly. I may have it here.

Q. Let's see what he says. How does this run, from the top to the bottom?

A. He said, the reports show that a foreman, that two plumbers and a foreman started installation of heaters on September the 25th, 1942. Then reports later on show that the installation of sinks and lavatories started on October 20, and those dates seem to be consistent or substantially so with all the other correspondence and letters in the claim.

(Testimony of F. Allen Taylor.)

Q. In Exhibit 6-A it states that the lavatories were received on October 21?

A. Yes. The inspector's report is consistent with this page 1 of Exhibit A because the inspector specifically states that the [77] foreman and two plumbers started on September 25, where this Exhibit 6-A says that installation of water heaters started on September 26. So it was on that basis that I made that division in the amounts of the total payrolls.

Q. In other words, just so I can understand your testimony, you credited none of the plumbing payrolls to installation of these fixtures before the fixtures were received?

A. That is correct. Shall I continue?

Q. Yes. If you will, continue.

A. Then the second—then, I had a second period. It was from—the second period began from September 24 to November the 4th.

Q. To November the 4th?

A. Yes. And I took that date, that period of payrolls, 14 to 19, because they are the dates in which I have in the architect's daily report detailed daily information as to what the plumbers were doing that were on the job. The total payrolls from that period from September 24 to November the 4th—that is, payrolls 14 to 19, inclusive—were \$16,000. And I made a list of the days that the architect representative stated that plumbers were working on the installation of plumbing fixtures.

Q. That is, is that the plumbing fixtures covered by these four requisitions?

(Testimony of F. Allen Taylor.)

A. That is right. And by comparing that with the number of plumbers and the number of foremen—for instance, for example, [78] one day he would have four plumbers—four foremen and 20 plumbers putting in sewers and water and testing the water and sewer system. He would have one plumber and three foremen installing fixtures. And by taking that information and comparing it to the payrolls, I made a list and struck an average. That is the best I could do. And I averaged for that many days during that period an average of 1 foreman for 33 days and 4 plumbers each for 33 days, and then averaged here for 33 days. And then I took one-seventh of the administrative costs as was shown in the claim. I took those figures in the claim and the payroll.

Q. Pardon me; just one question. May I interrupt you a moment? You regarded this as a claim under the contract?

A. I regarded it as a claim for additional work under the contract.

Q. And as such you considered the figure of overhead and profit?

A. Yes; yes. In making this estimate by taking the average for that 33 day period of which his total payroll was \$16,900, I reasoned that his probable expense for installing fixtures in that period was \$3372.

Q. Now, at this time you were furnished by the contractor with nothing except the statement that is in connection with 6-A and 6-B?

(Testimony of F. Allen Taylor.)

A. That is true. I had his claim statement and the payrolls [79] and the architect's reports.

Q. Payrolls and architect's reports?

A. And other progress reports; and by comparing those reports——

Q. And that time you didn't have the ledger sheets from Frick or you didn't have the time cards?

A. No ledger sheets or time cards or any other information.

Q. Have you prepared a resume of your findings in that connection, that is, of your first findings? A. Yes. Since——

Q. No, not since. Have you there a resume of your findings with reference to the first claim?

A. Yes. That is what I was——

Q. May I see this?

A. It is on the last of those three sheets.

Q. That is the last three of the sheets? This is your findings? A. Yes.

Q. Beginning on page 12, the page that is marked 12? A. Yes.

Q. 13 and 14? A. Yes.

Q. That is your findings. Now, that finding was based on the claim submitted by the claimant, that is, Exhibit 6-A and 6-B? A. That is true.

Q. And on this, these reports by the supervising—— [80] A. That is right.

Q. ——the inspector or supervisor for the architect.



(Testimony of F. Allen Taylor.)

Mr. Licking: At this time, if the Court please, I would like to mark these for identification as a basis for part of the report.

The Court: Defendant's Exhibit for identification, A.

(Thereupon the document referred to, resume of findings, was marked Defendant's Exhibit A for identification.)

Q. (By Mr. Licking): Let me see the report. Would that be page 11?

A. Yes; page 11 it would be.

Q. (By Mr. Licking): This, then, from page 11 on is a summary of your findings in the matter?

A. Yes.

Q. Does that conclude it there?

A. Oh, no. You have to have this sheet. The top of that sheet is the final total of 2696.

Q. The final total? A. Yes.

Mr. Licking: I apologize to the Court for taking this time. I had some data prepared with something else in mind.

Q. Well, this material which I now show you is in fact a copy of the pertinent portions of your report in the matter?

A. That is correct. That is. That shows how I arrived at the sum of — [81]

Q. At the final figure which was the figure set out in the supervisor's, immediate supervising officer's recommendation?

A. Allowance; that is right.



(Testimony of F. Allen Taylor.)

Q. Allowance?           A. Yes.

Mr. Licking: Counsel, I think probably for convenience of the Court, that is a partial copy of the report made by the witness, if the Court please. It sets out these more or less involved situations. I would like to have counsel look it over. I think it would assist the Court if it were admitted as a summary of the witness' evidence and I will offer it for that.

Mr. Harmon: Just a moment. We would like to examine this before he goes on.

Mr. Licking: Surely. I thought I might pass on while it was being examined.

Mr. Harmon: We can examine it and take care of it.

Mr. Licking: I thought one of you might clear up the evidence——

Then may I have a short recess in the matter?

Mr. Harmon: Did I understand you to say you were offering this?

Mr. Licking: It is a partial copy of the report.

Mr. Harmon: I won't object to it on that ground.

Mr. Licking: You had seen the report made before and he states the basis of his findings in the matter and I have given [82] the original basis of his findings, that is, the architect's reports. They are before the Court for identification.

Mr. Harmon: If you are making an offer of this, I want to make an objection.

Mr. Licking: Very well. I will offer it.

(Testimony of F. Allen Taylor.)

Mr. Harmon: I object to it, if Your Honor please, on the ground that it is irrelevant and immaterial. It is pure conclusion on matters that the Court has to decide.

The Court: Well, I understand counsel was offering it because it was in effect a summary of what——

Mr. Licking: Of the witness' testimony.

Mr. Harmon: Well, the witness has been here in person and has testified.

The Court: There is no foundation for it. It isn't an official record. It hasn't been shown to be an official record.

Mr. Licking: Well, if the Court please, the official records—however, this is an excerpt from the official report made by the witness and I——

The Court: I think the objection is good. Sustained.

Mr. Licking: Well, probably so.

Mr. Herman: Are you going to examine him any more along this line?

Mr. Licking: Yes.

Mr. Harmon: I will wait until he gets through.

Mr. Licking: Not more along this line.

Q. Now, since making the report to which you have testified and arriving at the——

Mr. Licking: The witness has used this as a summary of his testimony. I would like to have the witness express the conclusion, using this to refresh your recollection.

(Testimony of F. Allen Taylor.)

Q. If you will state to the Court what you found on your examination of the claims submitted by the plaintiff here and what report you made to your immediate superior in that matter.

Mr. Harmon: I will object to that question as irrelevant and immaterial, calling for the conclusion of the witness as to what he found.

Mr. Licking: Well, if it does call for the conclusion, I think he is the person who can express a conclusion. He is the person who did find it.

The Court: Overruled.

A. I am not sure that I understand the question.

Q. (By Mr. Licking): Not using that—I had, frankly, intended to introduce that to save time and save the record—using that to refresh your recollection on what you did in the course of your official duties, state what you did in terms of dollars and cents with reference to the plaintiff's claim.

A. Well, I have already told of how I divided the total payrolls into three periods, first, \$54,000, I didn't consider any of it was expended in installing plumbing fixtures. The second [84] period, payrolls 14 to 19, the total payroll amount was \$16,900, and by use of the inspector's report compared with the payrolls, I figured that out of that amount \$3372 was the amount of that \$16,000 expended on installing plumbing fixtures. Then, the third period, that is beginning with November the 5th to the

(Testimony of F. Allen Taylor.)

end of the job—and that was payroll No. 20 to 30—the balance of his payrolls amounted to \$7,080.99. Out of that I had to make an estimate of the amount that was spent on plumbing fixtures.

Q. That is installation of plumbing fixtures?

A. And the installation of plumbing fixtures. And I found by looking at the architect's report that the efforts were largely confined during that period to roughing in at the buildings and installing stall baths furnished by the contractor himself under the contract and to work on the sewers and water mains. And, let me see. Wait a minute. That is right.

Now, I have these papers out of order.

And I found that there was sufficient data in the architect's report to indicate that at least 20 per cent of that payroll for that period, \$7,080, was expended in completing and making the required tests for the rough plumbing of the buildings and installing the showers and doing other work but this applied to the installation of the plumbing fixtures. In other words, I gave him credit for 80 per cent of that \$7,000 during that last period. That last period the architect changed [85] inspectors or something and his reports weren't as specific as they were before, so I had to estimate from the other work that was shown that he was doing that, at least. I gave him credit there for 80 per cent of that, which amounted to \$5420. That is after I deducted \$245 labor that he was paid for extra

(Testimony of F. Allen Taylor.)

work. That would come out of his payroll. So I added the \$5420 to the \$3371 and got his, my estimate of his labor cost of installing the fixtures of \$8792. To that I added compensation insurance at the rate shown on the subcontractor's invoice and arrived at \$8975.75.

Then from the contractor's statement that the work should have cost him \$7105, I show an apparent overrun in the labor cost of \$1870.75. And to that I added the subcontractor's overhead of 8-91/100 per cent, and I have taken that from his invoice.

In addition to administrative expense already included in the payroll cost, that was \$166.

To that I added 15 per cent overhead and profit for the prime contractor, which was \$305. Then I added social security and old age benefits. That is 4 per cent of the labor cost, \$351. And I arrived at a total figure of \$2694.72.

Q. Now, subsequent to that time, since you made that estimate, have you been furnished with any further data?      A. Yes.

Mr. Harmon: I think at this time, if Your Honor please, [86] I should make my motion to strike all of the testimony of this witness upon that subject as a conclusion, as pure conclusion of the witness.

The Court: I think not. There is involved writing there. In view of the fairness of this action, and the contracting officer—you challenge his action



(Testimony of F. Allen Taylor.)

as being capricious and arbitrary and this is a direct refutation of that. The motion is denied.

Mr. Harmon: An exception, please.

Q. (By Mr. Licking): Now, since the time you have made the figures to which you have just referred, have you been furnished with any other supporting data?

A. Yes, we have. Yes, sir.

Q. What was that?

A. We have been furnished the contractor's time cards and ledger sheets which are in that box.

Q. Time cards and ledger sheets?

A. Yes, sir, and from those we have——

Q. Now, can you state whether or not from that material supplied by the claimant and the material heretofore supplied, can you state whether or not you have arrived at a conclusion as to the amount, if any, due the claimant under this contract?

A. We have prepared——

Mr. Harmon: Now, that question calls for a yes or no answer. [87]

Mr. Licking: Yes.

Q. Have you arrived at such a conclusion? Have you arrived at such a conclusion? Have you made another estimate?

A. Yes, we have. We have made another estimate.

Q. Can you state whether or not that estimate is different than the estimate you made in the first instance or whether you arrived at the same conclusion? A. It is different.



(Testimony of F. Allen Taylor.)

Mr. Harmon: I object.

Q. (By Mr. Licking): It is different. Can you state whether or not it is more or less than the original estimate?

A. It is less than the original estimate.

Mr. Harmon: If Your Honor please, I object to these questions as irrelevant and immaterial. They are conclusions of the witness.

Mr. Licking: Well, the witness has testified that he is an expert in this particular line, that this is his business, to make this type of estimate.

Mr. Harmon: I haven't heard any such expert testimony.

Mr. Licking: Do you question his——

Mr. Harmon: Not based on the costs at all. It is based on his conjecture.

Mr. Licking: It is——

Mr. Harmon: And opinion.

The Court: It is based upon whatever data he had. [88]

Mr. Licking: The data is here.

Mr. Harmon: But the data is here; the books and the records are here.

Mr. Licking: Well, you are available to cross examine him with reference to those.

The Court: He had to arrive at some conclusion and he was explaining how he arrived at that conclusion and on the basis of his conclusion it seems to me that is matter going directly to the fairness of the award that was made.

(Testimony of F. Allen Taylor.)

Mr. Harmon: Exception.

Mr. Licking: That is the basis on which they are offered.

Q. You have arrived at a different conclusion after examining this data, particularly the time cards and ledger sheets? A. I have.

Q. Now, would you state what steps you went through and what you considered in reaching that conclusion? First, what you did.

The Court: When did you do this?

A. We did this during the past week, or since this case was first called. We went over the time cards and made an analysis of the cost as shown on the time cards and ledger sheets and divided it into the same periods or dates from which I made the original estimate, for purposes of comparison; that is, installation costs during those periods.

Q. (By Mr. Licking): Did you use the same periods as in the [89] time cards and the data supplied by the claimant?

A. The time cards showed the same periods and we took off of the time cards and ledger sheets the amounts which the contractor used to make up his \$13,000 which he claimed to be the cost of installing the fixtures.

Q. That is the claim set out in Exhibit 6-A and 6-B?

A. Yes. We took all of the items as near as we could that were pertinent to installing the fix-

(Testimony of F. Allen Taylor.)

tures and added them up, but instead of getting \$13,000 we actually got \$15,000. Maybe—I don't know which items—there is a lot of items on there, you see, that comprise the cost of installing the fixtures, but we took them off of the time cards, the daily time cards, which also—the same amounts show on the ledger sheets.

Q. Yes.

A. They were either posted from one to the other, I don't know which way they were posted, but posted from one to the other.

Q. The total amount——

A. The total of \$15,000; and we broke that amount up into the same periods of time which I had originally taken the contract. In other words, we took the first 14 payrolls. Then we took 15 to 19, then from 20 to 30; the payrolls. And what we found was that on the first 13 payrolls——

Q. Now, that particular examination, your last examination of the matters which have been identified here, the ledger sheets and the time cards submitted by the claimant here, you have [90] reduced that to a report?      A. That is right.

Q. And that is what you are testifying from here?

A. We made an analysis and comparison. Then we made a written report.

Q. Did you arrive at a definite conclusion as to the amount, if any, due the claimant for a so-called override on installation costs?

(Testimony of F. Allen Taylor.)

A. Yes. We found that on the time cards, that on the contractor's payroll cards, for the first 16 payrolls—that is all of the costs for installing the fixtures prior to October the 20th, 1942, the total cost was \$9524.01.

Q. That was prior to October 20?

A. That was prior to October the 20th.

Q. Now, at that time, do you recall what fixtures, if any, had been furnished them and could have been installed prior to that time?

A. Prior to that—that was the date of the delivery of the plumbing fixtures, or about that date.

Q. Well, prior to that time the oil heaters and the water heaters had been delivered?

A. Oh, yes. Prior to that time the oil heaters and water heaters had been. Some had been installed, but the \$9500 figure does not include that. In addition to that \$9500, there was expended, beginning back on payroll 6 they started with a \$20 expense installing water heaters, and during that first 13 payrolls they had \$80. I didn't add that in. I only added up the cost of what is represented to be the installation of the plumbing. The time cards don't say plumbing fixtures. They say plumbing installation or unit installation, which we figured was the installation of the plumbing fixtures. So I take only the items which refer to installation of the plumbing fixtures, and we find that they amount to—that is exclusive of the water heaters and the ranges—we find that that amounts to \$9524 before the fixtures were delivered.

(Testimony of F. Allen Taylor.)

Q. In other words, there is a charge on the time cards apparently made for the installation of fixtures of some \$9400 before the fixtures were delivered? A. That is right.

Q. And what period of time is that?

A. That is on the first 16 payrolls up to and including October 20, I believe.

Q. Up to and including October 20. Do you find any other difference or discrepancy?

A. Then I made a notation that the statement of facts show that the fixture installation began on October 20 or 21, 1942, and by means of averages taken from the architect's reports \$3372 was expended for this purpose, but the contractor's payroll cards claim \$2294 on payrolls Nos. 14, 15 and 16 was spent for installing fixtures, which was prior to the date of their [92] delivery; and \$1881 after October 21, plus \$624 for water heaters and \$290 for gas range installation, making a total of \$2797. That figure would be in comparison to the \$3372 which we set out in our allowance.

Q. (By Mr. Harmon): Is that the second period you are speaking of?

A. That is the second period. Then payrolls 20 to 30, the statement of fact estimates that the fixture installation cost during this period was 80 per cent of the total period or a net of \$5420. The contractor's payroll cards show that this expense was \$2815.59, or \$2604.41 less than estimated by the Government.

(Testimony of F. Allen Taylor.)

Then a summary of the comparison is as follows: The first period no fixtures were installed except water heaters, \$80.85.

The second period, contractor's costs after 10-20-42, the date of the first fixture delivery, including water heaters and gas ranges, \$2797.20.

The third period, costs represented by the contractor's payrolls, \$2815.59.

Total, \$5693.64 plus, for the community building, \$109.98.

Cost to contractor, \$5803.62.

From those figures it is apparent that the cost of installing, the actual cost of installing the plumbing fixtures was \$5803.52 instead of the \$13,000 or instead of the—that the contractor claimed—or instead of the \$8792 that the Government first estimated. [93]

Mr. Licking: May I ask a question, Your Honor? I don't recall whether these ledger sheets and time cards were given numbers.

The Clerk: No. 7.

Mr. Licking: May the ledger sheets be called 7-A and the time cards 7-B? That would be more convenient to refer to them. If you haven't any objection to that?

Mr. Harmon: No.

(Thereupon the ledger sheets and time cards in Plaintiff's Exhibit No. 7 were marked 7-A and 7-B, respectively.)

Q. (By Mr. Licking): Well, then, your pres-



(Testimony of F. Allen Taylor.)

ent conclusion, based on the data supplied by the claimant, is that on the claimant's——

Mr. Harmon: What was that question? Will you repeat it?

Mr. Licking: I said, your present conclusion based on the data supplied by the claimant or plaintiff and that which you already had is different than your original conclusion expressed in the report to which you have testified?

A. That is right.

Mr. Harmon: I object to that, if Your Honor please, and ask it be stricken on account of it is irrelevant and immaterial.

The Court: That is the only deduction that can be drawn from his testimony. It is just a summation from his testimony.

Mr. Licking: Yes. [94]

Q. What is the difference?

A. The difference——

Q. I think that is—presently, do you find, on the basis of the data submitted by the claimant here and your interpretation of it in the light of the data you had——

The Court: It is a matter of subtraction, isn't it?

Q. (By Mr. Licking): And the claim——

The Court: He just gave the figures.

Mr. Licking: I will ask him. I didn't understand him to testify to the figures.

The Court: Yes, he gave the figures. Take one away from the other and you have it.

(Testimony of F. Allen Taylor.)

Mr. Licking: That is true. It is a computation the Court can make. Well, don't bother.

Q. It is a matter of computation from your statements and what you have testified?

A. That is right.

Mr. Licking: I should like, for the convenience of the Court, to offer a summary statement which the witness has testified to.

Mr. Harmon: I object to it on the ground it is irrelevant and immaterial.

The Court: Sustained.

Mr. Harmon: Conclusion of the witness. I want to use that in examining the witness. [95]

Mr. Licking: Not sustained on the ground it is a conclusion of the witness?

The Court: No; immaterial.

Mr. Licking: I have no further questions.

### Cross-Examination

Mr. Harmon: May I take the statement, please?

Mr. Licking: Surely.

Q. (By Mr. Harmon): Mr. Taylor, referring to your first findings that you testified to here, you accepted the figures of the contractor as to the reasonable costs that would have been involved had the fixtures been delivered and installed at one time, is that right?

A. We used that in making our——

Q. Yes. So that the only dispute between your conclusion and the claim at that time was based

(Testimony of F. Allen Taylor.)

on whether or not the figure of \$13,000-odd was correct?      A. I am not so sure.

Q. You can answer that yes or no, can you not?

A. I am not sure that that was the only consideration there.

Q. Well, isn't it true that you arrived at your conclusion by deducting the \$7100-odd from the amount that you computed?      A. Oh, yes.

Q. Rather than from the \$13,000?

A. That is right. [96]

Q. So that the only dispute between you and the claimant as of that time was whether or not the \$13,000-odd figure should be accepted?

A. That is right.

Q. Yes. Now, in your latest conclusion you have come to the opinion that the cost of these installation was even less than the \$7100 figure, is that right?      A. Yes, that is right.

Q. And that notwithstanding the fact that those fixtures were delivered piecemeal over a period of several months involving substantial extra time during the rainy season, is that right?

A. That is right.

Q. Now, Mr. Taylor, when this claim was referred to you for your examination, what was the data that you say you based it on?

Mr. Licking: Which time, counsel?

Mr. Harmon: I am referring to the first examination.

A. The statement was submitted by the contractor, the plumbing contractor's payroll.

(Testimony of F. Allen Taylor.)

Q. (By Mr. Harmon): That is a copy of the payroll furnished to you?

Mr. Licking: Let him finish his answer.

A. Yes.

Mr. Harmon: Beg your pardon.

Mr. Licking: He hadn't finished his answer. [97]

Mr. Harmon: I merely wanted to make it more certain. I was not trying to change the tenor of his thinking.

Q. Those two things are what you based it on?

Mr. Licking: He hasn't finished his answer.

A. No. There was another thing. I have daily reports of the architect.

Q. (By Mr. Harmon): Do you know where those—that payroll came from?

A. The payroll.

Q. Yes.

A. The payroll, each contractor is required under the contract to submit a copy of his payroll to the Government, and they are in the Government's file.

Q. Yes. You know, as a matter of fact, or do you recollect, Mr. Taylor, that at that time the Government's copy of the payroll had been mislaid and that it was necessary for the contractor——

Mr. Licking: What difference does it make, counsel, if it had or hadn't? There was a copy supplied.

Mr. Harmon: This is cross-examination, if Your Honor please, and I ask the right to go into——

Mr. Licking: Cross examine on a matter—what

(Testimony of F. Allen Taylor.)

difference does it make whether the Government's copy had been lost or not? They were supplied by the claimant.

The Court: Proceed. [98]

(Question read.)

Q. (By Mr. Harmon): To supply another copy so you could go into it?

A. There are 30 payrolls. Out of the 30 payrolls we were shy a few. I will say 6. I have the dates. That is in the record, the dates of those that were shy. And we borrowed those six from the contractor.

Q. You needed those to complete your examination?

A. When I made a layout, an analysis of the payroll, I was shy six payrolls and I borrowed those from the contractor and filled in those amounts and returned those that I had borrowed to him.

Q. The contractors?

Mr. Licking: Is this—this is purely irrelevant.

The Court: Overruled.

Q. (By Mr. Harmon): The contractor furnished those payrolls willingly, didn't he?

A. That is true.

Q. You made no request at that time for any other data such as time cards or ledger sheets, did you.

A. Yes, sir.

Q. Did you?

A. Oh, yes. I don't know that at the same time I asked him for the payrolls, but I did of Mr. Lindsay.

(Testimony of F. Allen Taylor.)

Q. To whom did you make that request? [99]

A. Mr. Lindsay.

Q. Which Mr. Lindsay?

A. Mr. Ray Lindsay.

Q. And where was it made?

A. He came to our office. I telephoned him.

Q. You telephoned him for what?

A. I telephoned him to talk about this claim and asked him to submit evidence that we could work from.

Q. Isn't it a fact that you only asked him for the payrolls?

A. I didn't specify what evidence he should supply to support his claim. We didn't have enough evidence. We didn't have the evidence, all the evidence in the claim, and I informed him of that.

Q. Well, you asked for the missing payrolls, didn't you?      A. That is right.

Q. Did you ask for anything else?

A. I didn't specify what else. I don't know what else he had.

Q. All right. And did you—you didn't specifically ask for time cards, then, did you, or ledger sheets?

A. I don't recall asking for time cards or ledger sheets.

Mr. Licking: That is a waste of this time, cross-examination, counsel. I will stipulate to——

Mr. Harmon: I have a right to cross-examine this witness.

The Court: Proceed.



(Testimony of F. Allen Taylor.)

Q. (By Mr. Harmon): Now, Mr. Taylor, when you made your [100] finding there at first, the result thereof was in due course transnitted to the plaintiffs here, wasn't it?

A. That is——

Mr. Licking: That is apparent, if the Court please, from the exhibits on file in the case.

The Court: I think so.

Mr. Licking: That the report was transmitted.

Q. (By Mr. Harmon): Did you have any further talk with Mr. Ray Lindsay or Mr. Claude Lindsay after that report had been made?

A. No, sir.

Q. It is true, is it not, Mr. Taylor, that request was made for information as to the basis on which the claim was broken down and allowance made of \$2600 while the other was refused?

Mr. Licking: I would stipulate that was made and was refused.

Mr. Harmon: Will you?

Mr. Licking: Yes.

Q. (By Mr. Harmon): Now we come down to the later period. You were present in the office of Mr. Licking on one of the days when this case was previously set for trial, were you not? In the presence of Mr. Licking, Mr. Ferguson, myself, Mr. Henderson and Mr. Lindsay? A. Yes, sir.

Q. That information as to how you had arrived at those [101] figures was, had not been supplied up to that time, had it not?

(Testimony of F. Allen Taylor.)

A. Had not been supplied to whom?

Q. To the plaintiff? A. That I——

Mr. Licking: Stipulate.

A. That I can't answer.

Q. (By Mr. Harmon): You recall our asking——

Mr. Licking: I will stipulate it had not been furnished up to this time, counsel. I won't stipulate as to the other.

Mr. Harmon: At this time, if Your Honor please, in order to examine this document that the witness testified from, I would like to ask for a recess for a few minutes.

The Court: I am going to be obliged to adjourn at 4:00 o'clock. Are you going to be able to finish your examination of the witness?

Mr. Harmon: I hope so.

Mr. Licking: The Government has no more evidence.

The Court: Take a recess.

(Recess.)

Mr. Harmon: If the Court please, at this time the plaintiff requires an adjournment to give it a chance to examine into the computation by this witness and the claim that it is based upon the time cards and so on. In that respect, if Your Honor please, I might say this, that at the time the claim was rejected, plaintiff sought information as to the reason for [102] allowance in part and rejection in part. They were refused information. We were

(Testimony of F. Allen Taylor.)

forced to file suit. At all times we have sought to get this thing adjusted. When it was set for trial, we contacted Mr. Licking and when it was put over at that time, we sought with him——

The Court: That is all right. You are asking for an adjournment now. Any objection?

Mr. Licking: Yes, if the Court please, because the adjournment is not an adjournment to look into any statement made by the Government. It is an adjournment to look at their own ledger and their own time cards. The situation presented from the testimony of this witness is that their claim is based, at least one-third of their claim is based for an installation charge during the period of time when there wasn't anything to install, and there couldn't have been this charge, and that shows in their own ledger and they are asking for a continuance to examine their own books.

The Court: Nobody is going to be injured if we have an adjournment until Monday.

Mr. Licking: May we have an adjournment, then, until Monday afternoon, at 2:00 o'clock?

The Court: Yes, Monday afternoon at 2:00 o'clock. Very well.

Mr. Harmon: And may we have permission to withdraw these exhibits? [103]

Mr. Licking: Certainly, as far as I am concerned.

The Court: No objection?

Mr. Licking: There is no objection.

(Testimony of F. Allen Taylor.)

The Court: The Court is in adjournment until Monday morning.

(Thereupon an adjournment was taken until 2:00 o'clock p.m., Monday, October 20, 1947.)

### CERTIFICATE OF REPORTER

I, Grace Curtis, Official Reporter, pro tem, certify that the foregoing 104 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ GRACE CURTIS. [104]

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Monday, October 20, 1947, Afternoon Session 2:00

Mr. Harmon: Mr. Taylor was on the stand, your Honor.

F. ALLEN TAYLOR

resumed the stand in behalf of the defendant; previously sworn.

Cross-Examination

(Resumed)

By Mr. Harmon:

Q. Mr. Taylor, just what were your duties, what were your duties?

Mr. Licking: You mean at the time——

Q. (By Mr. Harmon): Let's start at the time that this matter was first referred to you. Were you employed by the Government at that time?

(Testimony of F. Allen Taylor.)

A. Yes, I was employed FPHA in the claims section of the regional office.

Q. What did you do in that work, examine claims and figures?

A. Yes, I examined the claims that were presented by the contractors. Those claims first came to our department through certificate releases that the contractors gave. If the contractor gave the Government a certificate and releases in connection with his contract and made any reservations on that, then that reservation would apparently become a claim and we began our investigation then.

Q. You had no actual experience out on the contracting job, that is, out on the project, of any nature?

A. Not prior to investigating claims. [105]

Q. And in this particular claim did you go out on the job and do any examining up there?

A. I went to this project, but not—I had no particular investigation of any construction to investigate out there. I went there to examine the records of the Housing Authority which were at the project.

Q. And when was that?

A. That was—I can't give you the date from memory, but it was shortly after the claim was presented by the contractor.

Q. Now, Mr. Taylor, you recall from the file, but I don't know whether you testified that you had anything to do with that original change order No. 60, I believe it was——

A. That is right.

(Testimony of F. Allen Taylor.)

Q. Did you have anything to do with that?

A. Nothing to do with that, no, sir.

Q. Your work came subsequent to that time?

A. That is right.

Q. Now, it was after that time that you went to the project, you say?

A. That is correct.

Q. And whom did you talk to, if anyone, at that time?

A. I talked to the young lady in charge of the Housing Authority records.

Mr. Licking: It seems to me, if your Honor please, it is immaterial who he talked to. He testified he merely went there [106] to get the records.

The Court: Overruled.

A. I went into the office of the Housing Authority to look through their files, and I talked there only to a young lady, whose name I don't recall now.

Q. (By Mr. Harmon): You didn't talk to Mr. Towers, the project engineer? A. No, sir.

Q. Did you talk with Mr. Geddes?

A. No, sir.

Q. What was his capacity there, if you remember?

A. Mr. Geddes was a representative of the project architect.

Q. And did you talk to Mr. deLappe, the architect himself? A. No.

Q. It is true, isn't it, Mr. Taylor, that at no time



(Testimony of F. Allen Taylor.)

in your connection with the claim, did you talk to any of these gentlemen concerning the claim?

Mr. Licking: Object, your Honor, on the ground it is immaterial whether he did or not.

The Court: Overruled.

A. I didn't consult with them.

Q. (By Mr. Harmon): Now the records show you went there to get—were they these records that are marked Defendant's Exhibit A?

A. Those records—no, I didn't get those at the Housing [107] Authority, but I got those from the architect. I didn't visit him, but I talked to him on the phone and obtained those records from the architect.

Q. What records pertaining to this matter did you examine out there at the project?

A. The payrolls.

Q. The payrolls. Your report was based solely upon your examination of the payrolls and the claim and this document, Defendant's Exhibit A, that you got from the architect?

A. Yes—I would like—I might clarify that: Of course, we had a lot of records in the regional office, such as the project engineer's semi-monthly report. He makes a report called a 377 report that comes in twice a month, reporting the progress and conditions and his remarks as to the progress on the job.

Q. Now, you examined these documents again in connection with the time cards and ledger sheets

(Testimony of F. Allen Taylor.)

just recently, did you not?           A. Yes.

Q. And you discovered at that time, did you not, that this Defendant's Exhibit A in general corroborated the time cards?

A. I don't believe I quite understand.

Q. They are in conformity? There is no place here in this Exhibit A which is contrary to what is shown on the time cards?

A. I believe there is a difference.

Q. Well, isn't this the only difference, that this document, Defendant's Exhibit A, does not show all of the time of all of [108] the men that were on the project that is shown on the time cards? In other words, isn't it true that there is more shown on the time cards than there is here in this document?

A. A greater number of employees.

Mr. Licking: That is not with reference to this particular item.

Mr. Harmon: Yes.

Mr. Licking: That is not with reference to this particular item.

Mr. Harmon: Yes, with reference to this particular item.

Mr. Licking: That is, the time cards that were submitted by the claimant show more time, but not on this particular item.

Mr. Harmon: On plumbing and everything else.

Mr. Licking: Have you the inspector's reports?

(Document was handed to Mr. Licking.)

Mr. Licking: Stipulate that that is the fact.

(Testimony of F. Allen Taylor.)

Mr. Harmon: All right.

Q. There are a number of occasions when this shows a considerable number of employees out there on the job when a much smaller number is shown here?

A. I didn't make a man-to-man comparison between that document and the time cards, but when I first started on the case, I made a comparison between them in the actual payrolls and I found them agreeing in all instances. In other words, the payrolls reflect the same number of employees that the time cards [109] do.

Q. Isn't it true that so far as this record is concerned, it does show the items, all the items in the payrolls and the time cards?

Mr. Licking: Already been asked and answered. He said it doesn't.

The Court: Overruled.

A. I couldn't swear that all on the time cards are on the payrolls exactly, because I haven't made a detailed check in that respect.

Q. (By Mr. Harmon): You made no discovery of any great discrepancy on that score, though, did you?

A. No. I didn't examine that at all.

Q. Now, going to the last figures on your breakdown, I think you testified you found some \$15,-327.67 rather than the thirteen thousand-odd dollars covered in the claim, to begin with, is that right?

(Testimony of F. Allen Taylor.)

Mr. Licking: He found that or he found that the records submitted by the claimant did?

Mr. Harmon: He found that through his record.

A. That is correct. The figures that we took from the time cards weer actually lifted off by Mr. Ferguson and they totaled \$15,327.

Q. Now I think you testified that you broke that item down into three months based upon the period of time; the first amount, [110] October 20, expenditures up to that time, \$9,524.01, is that right?

A. Yes.

Q. Now, I didn't get the breakdown on the other two items. Will you give me item No. 2 again, please?

A. The \$9500 is all of item No. 1.

Q. Yes.

A. That is, \$7,229 in the first three weeks of item No. 2, I have taken that in order to get to the date of October the 14th. You asked me the amount of item No. 2. Item No. 2 consisted of six payrolls, but when I arrived at the \$9500, in order to determine the amount shown on the cards spent before October 20, I had to take the three payrolls off of item No. 2, and that makes the total of \$9500, leaving in item No. 2, which was \$5,091 off the six payrolls—I have taken 2700 off of that, which leaves it approximately \$2,390 in item No. 2.

Q. Now, you didn't give me the date covered by that period No. 2.

A. The full period No. 2 covers from the week

(Testimony of F. Allen Taylor.)

ending September 30, 1942, to 11-4-42. The last three payrolls of that period would cover the week ending October 21, 1942, to November 4, 1942.

Q. Now, if I get you correctly, this item of \$2,391 represents the period October 21 to November 4?      A. That is true.

Q. And the other part of it is a sort of duplication of the 9500 [111] and you eliminated that from No. 2?

A. Yes, the first three payrolls there.

Q. All right.

A. I added that onto the first period.

Q. Now give me the dates on the third period and the amount.

A. The third period, the last ten payrolls, covers the period from week ending November the 11th, 1942, to January 20th, 1943, and the total amount which we have listed for installation, which we assume was installation of fixtures, was \$2,282.10, and the total payrolls in that period, including water heater installation and gas range installation, was \$2815.19.

Q. Now, which figure did you allow on your final computation?

A. I am not sure just which computation you refer to changes the conclusion that the actual cost as shown by these cards compared by what we could get off of them was \$5,803; I included all the costs of instllation costs, including water heaters and the ranges.

(Testimony of F. Allen Taylor.)

Q. In that period No. 3, then, what was the figure you reached? A. \$2,815.59.

Q. Now in reaching that figure of \$5,803.60, you eliminated entirely that period No. 1, didn't you?

A. The 9500, yes.

Q. Why did you do that?

A. I said I eliminated that entirely, I allowed \$80.85 which was shown on the cards as being installation of water heaters, [112] and the \$9500 which we listed as representing the installation of plumbing—the cards say “installation,” they don't say what—so we assumed that, inasmuch as they didn't designate water heaters or range installations, that that was intended to be the installation of fixtures, and so the \$9500 of that period was the amount that we listed which we assumed represented the installation of fixtures.

Q. That is an assumption on your part? You say you assumed that?

A. It says installation.

Q. Mr. Taylor, as I recall it, you testified that you eliminated that \$9500 because that represented the period prior to October 21 during which there had been no installation, because there had been no installation prior to that time.

A. Because there had been no installation of plumbing fixtures.

Q. Well, what do you mean by that? Do you differentiate between plumbing fixtures and the installation of any of these items, other items?



(Testimony of F. Allen Taylor.)

A. I didn't differentiate between them. The differentiation was made in the claim itself. The contractor set out so much for installation of fixtures, from which he separated the installation of heaters, and I was simply trying to make a list that would be comparable to the claim.

Q. Now, you know as a matter of fact, there were substantial charges incurred before that time, didn't you? [113]

Mr. Licking: Substantial charges for what?

Mr. Harmon: Installation of these mass purchase items that are covered in the claim.

Q. Do you understand the question?

A. I am not sure of that.

Mr. Licking: This exhibit here shows that none of them except the oil and water heaters were used.

Mr. Harmon: This part of it.

Mr. Licking: What?

Mr. Harmon: This part of it, and that was done, wasn't it?

Mr. Licking: The oil heaters and water heaters?

Mr. Harmon: Let me show you—I have defendant's Exhibit No. A and I call your attention to the page for September 24, 1942—wait a minute, that must be the wrong one—September 25, 1942.

Mr. Licking: May I see it?

Mr. Harmon: Yes (handing document to Mr. Licking).

Q. You note here there were——

Mr. Licking: Just a moment. No objection.

(Testimony of F. Allen Taylor.)

Q. (By Mr. Harmon): Do you note here that there were 20 plumbers and one apprentice plumber? A. Oh, yes.

Mr. Licking: To which I object——

Q. (By Mr. Harmon): And do you note that——

Mr. Licking: If the Court please, that is not responsive to [114] the question; he is discussing the installation of particular fixtures, and on this document there is some \$2400 worth of work shown which is not covered on this installation at all.

The Court: I think that is proper cross-examination. Overruled.

Q. (By Mr. Harmon): Do you note here that in the discussion it is “plumbers installing water heaters and ranges”? A. That is right.

Q. Down here it says, “Two plumbers installing plumbing fixtures,” is that right?

A. Yes, sir.

Q. Now we come to the next page here on September the 26th, you notice that it has here, “1 foreman, 2 plumbers on plumbing tests.” “Men also working on porches and stairs, laying linoleum, installing electric fixtures, water heaters and ranges and hardware.” A. That is right.

Q. On September the 28th it says, “Two plumbers installing heaters and water heaters.”

A. Yes, sir. Do you find the one that says they started installing water heaters and the next one that said they started installing plumbing fixtures?

(Testimony of F. Allen Taylor.)

Q. We will come to that a little bit later. If you can find that, we will be happy to have you, but right now I want to ask you the questions. This is the one for September the 29th. That [115] involves one foreman, five plumbers installing ranges and water heaters.

A. That is right.

Q. That is on another phase of it; we won't go into the record on that. September the 30th, "two plumbers installing heaters and water heaters."

A. Yes.

Q. "One laborer and one plumber on plumbing tests."

A. That is right.

Q. October the first, "two plumbers installing heaters and water heaters"; October the third, "one foreman and plumbers installing heaters and water heaters, and two plumbers fixing chimneys"; October the sixth, "one foreman, three plumbers on heaters and water heaters and ranges; October the eighth, one foreman, two plumbers installing heaters, water heaters and ranges; on the 12th, one foreman, four plumbers and one helper installing heaters, water heaters and ranges; on the 13th, one foreman, three plumbers installing heaters, water heaters and ranges; October the 14th, one foreman, five plumbers installing heaters, water heaters and ranges; on the 15th, one foreman, two plumbers installing heaters, water heaters and ranges; on the 16th of October, one foreman, four plumbers installing heaters, water heaters, ranges; on the 19th, one foreman, three plumbers installing water heat-

(Testimony of F. Allen Taylor.)

ers and ranges; on the 21st, one foreman, eight plumbers installing heaters, water heaters and ranges and [116] fixtures.

Now, those are all there in the reports, are they not?      A. That is true.

Mr. Licking: As a matter of fact, counsel, doesn't the compilation that the witness testified to show that those items were——

Mr. Harmon: I understand, Mr. Licking——

Mr. Licking: You have the compilation that the witness figured; doesn't that show an allowance for the installation of those heaters?

Mr. Harmon: No, it makes no allowance as far as I know.

Mr. Licking: Pardon me; I am talking—I furnished you with a copy of the compilation prepared by the witness here. You have it. He just testified he allowed \$80.00 for that period. I furnished that to you, and as a result of that—at the opening of the case—it shows an estimate of \$2,624.65 allowed for water heater installation for that period, doesn't it? Maybe I misunderstand it.

Mr. Harmon: Well, the items I have read here are away more than that.

Mr. Licking: Are they?

Mr. Harmon: I think they are.

Mr. Licking: Well,——

Mr. Harmon: And we have some further evidence on that to put on in rebuttal when I finish my cross-examination. [117]

Q. Isn't it a matter of fact, Mr. Taylor, that

(Testimony of F. Allen Taylor.)

you didn't allow anything other than \$80 up to October 20?

A. In forming this \$5,803?

Q. That is right.

A. No, that is not exactly correct, because on—there was \$80 on the first period—that is up to the first 13 payrolls, and then up to October 20 there were three more payrolls that amounts were taken from the time cards, and that amount was roughly—I can add those up for you—another \$449 added to the 80—86—in the \$5800 which we listed from the time cards we found that \$531 approximately were listed for the installation of water heaters and gas ranges prior to October 20.

Q. Now, Mr. Taylor, calling your attention to the first pages of this memorandum which you testified to the other day—I guess it isn't the first page——

Mr. Licking: Pardon me, counsel, if it is of record—do you mean the memorandum from which he testified or the memorandum to which he testified?

Mr. Harmon: The memorandum which he used to refresh his recollection to testify. That is the memorandum from which he testified.

Mr. Licking: Yes.

Q. (By Mr. Harmon): Isn't it a fact that in this memorandum which you used in your testimony the other day you deducted all of payroll No. 1 in the sum of \$9,524.21? [118]

A. Not exactly, that doesn't deduct all those payrolls, that deducts all of them with the exception of

(Testimony of F. Allen Taylor.)

approximately \$531 for the installation of water heaters and gas ranges. The list that we have made for that period totals \$9,524 under the heading of installation. In addition to that, during that period we listed off \$531 for installation of water heaters and gas ranges.

Mr. Harmon: That is all.

Mr. Licking: I have no further questions. If the Court please, for the convenience of the Court, I would again like to offer the memorandum from which Mr. Taylor has testified, which merely collects certain figures and shows the application and the reference to exhibits already before the Court.

Mr. Harmon: We object on the ground no foundation has been laid for it.

The Court: I will sustain it.

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THOMAS R. NICKEL

recalled for the plaintiff, in rebuttal, previously sworn.

Direct Examination

By Mr. Harmon:

Q. You are the same Mr. Nickel who testified the other day?

Mr. Licking: I will stipulate to that.

Q. (By Mr. Harmon): You testified the other day that you were the keeper of the records of the Frick Plumbing Company during this project?

A. Yes.



(Testimony of Thomas R. Nickel.)

Q. And they were made by you personally and under your personal supervision, is that right?

A. Yes.

Q. Have you had occasion since you were in court here the other day to go over those records once more, and by those records I mean the ledger sheets and time cards and this architect's report, Defendant's Exhibit A?

A. I had a very short time, very rapidly went over them and checked them again.

Q. And did you at that time take from those documents the items which went to make up the original claim, the figures of which you gave to Mr. Lindsay some years ago?           A. Yes.

Mr. Licking: To which I object on the ground it is not rebuttal.

The Court: Overruled.

Q. (By Mr. Harmon): I show you here a document in typewriting marked "Summary of Costs on Installation"—

Mr. Licking: The further objection is it is conclusion and the Court's attention can be called to the original exhibits.

The Court: Overruled.

Q. (By Mr. Harmon): Is that the summary which you made (exhibiting document to witness)?

A. Yes, that is the figures placed in the summary which I drew [120] off the ledger sheets.

Q. Are those figures actually in the ledger sheets and the time cards?           A. They are.

(Testimony of Thomas R. Nickel.)

Mr. Harmon: I would like to offer that in evidence.

Mr. Licking: If the Court please, what is the purpose of this offer in evidence, may I ask, to show what?

Mr. Harmon: The purpose of this, if the Court please, is to show a breakdown——

The Court: A breakdown of what?

Mr. Licking: A breakdown of what?

Mr. Harmon: ——of the claim that was filed here.

Mr. Licking: Now, wait, is this supposed to be a breakdown of the claim which was filed?

Mr. Harmon: It is a breakdown of the costs——

Mr. Licking: Wait a minute. I am asking if this is supposed to be a breakdown audit of the claim which was filed. That is the only thing that has been in evidence before the Court. Or is this something else? If it is something else, it isn't rebuttal.

Mr. Harmon: It isn't something else; it is a breakdown on that claim. There may be some difference between them. There is a period of five years between the time one was prepared and this, but it is a breakdown——

Mr. Licking: If the Court please, may I ask if in that [121] five years there has been any change in the books of record, since that claim was made?

Q. (By Mr. Harmon): I will ask that: In that five years since that claim was made, has there been any change in the books of record?

A. No; other than there are some copies I noticed

(Testimony of Thomas R. Nickel.)

some of the other gentlemen had just checked, but there were no changes in the records themselves.

Mr. Harmon: I will renew my offer.

The Court: It will be received.

(The document referred to was marked Plaintiff's Exhibit No. 9 in evidence.)

Mr. Harmon: You may cross-examine.

Mr. Licking: I have no questions.

Mr. Harmon: Mr. Lindsay, will you take the stand?

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RAY T. LINDSAY

recalled for the plaintiff in rebuttal, previously sworn.

Direct Examination

By Mr. Harmon:

Q. Mr. Lindsay, directing your attention to the time at some time subsequent to the filing of the claim herein, I will ask you if Mr. Taylor made any request to you at any time for all the supporting data for your claim.

Mr. Licking: To which I object on the ground it is immaterial. [122]

The Court: Overruled.

A. To the best of my recollection, he never asked me for any information at all.

Q. (By Mr. Harmon): Did anyone representing the Government ask you for any information?

(Testimony of Ray T. Lindsay.)

A. Yes, Mr. Lindstrom asked me for information.

Q. Who is Mr. Lindstrom?

A. Mr. Lindstrom was the——

Mr. Licking: May I have the general objection, if the court please, to all of his testimony? It is not rebuttal.

The Court: Very well.

Q. (By Mr. Harmon): Did you state who Mr. Lindstrom was?

A. It is my understanding Mr. Lindstrom was in charge of adjusting claims. He is the one that contacted me direct.

Q. Do you recall about when it was that he made a request of you?

A. Along in the early part of 1945.

Q. Do you remember what he requested from you?

A. He requested the plumbers' payrolls only.

Q. Did he request anything else?

A. To the best of my knowledge, nothing else.

Q. Did you supply those payrolls to him?

A. I did.

Q. Did you supply everything that was ever requested to him? A. Yes, we have. [123]

Mr. Harmon: That is all.

### Cross-Examination

By Mr. Licking:

Q. The time cards and ledgers which were fur-

(Testimony of Ray T. Lindsay.)

nished at my request after the institution of this action are correct, are they not?

A. Did you say are they correct?

Q. Well, they are your original records?

A. They are the plumbers' original records.

Q. They are the plumbers' original records?

A. Yes.

Q. So far as you know, of course, they are correct?

A. As far as I know.

Q. Those are the basis of your claim?

A. That is right.

Q. That is, the sixty-eight hundred and some odd dollar claim you put in for profit and overhead?

A. Yes.

Mr. Licking: That is all.

Mr. Harmon: Plaintiff rests.

Mr. Licking: May I ask—Just take the stand again.

Q. You said the first request for any more supporting data or any supporting data was when?

A. As I recall it, in 1945, early 1945.

Q. Early in 1945? A. Yes. [124]

Q. This—May I see Exhibit 10-E—this, I take it, is what you referred to in April of 1945? Calling the witness' attention to Exhibit 10E (exhibiting document to witness).

A. This is some correspondence in connection with it.

Q. Calling your attention particularly to the third paragraph of the letter after your claim was submitted and apparently denied:

(Testimony of Ray T. Lindsay.)

“Should you decide to make an appeal, then an original and one copy should be sent direct to the head of the department and two copies of same sent to this regional office. Clarity in making an appeal and its supporting data promotes an early decision by the head of the department. That, as a suggestion, an appeal be made up of four divisions, as follows:

1. Facts.
2. Your claim.
3. The contracting officer's decision.
4. Your reasons for appealing the decision of the contracting officer.

“The above named divisions should be amplified by complete explanatory elaborations (a) clearly stated and explained in concise, understandable terms; (b) evidence when necessary by factual, oral statements or quotations giving names of persons having made the statements; (c) giving positions, titles or related connection with the contract work when [125] mentioning names; (d) giving locations and addresses when using names of proper people or places.

“The evidence submitted can only be evaluated by proper review and investigation and therefore, the entire appeal should be very carefully made up to include only that which would upon investigation prove true and authentic.”

That was, you say, some of the correspondence and some of the directions with reference to the matter?      A. Yes.



(Testimony of Ray T. Lindsay.)

Mr. Licking: I have no further questions.

Mr. Harmon: That is all. We submit it, if Your Honor please. Twenty days to a side?

Mr. Licking: If the Court please, I move to strike the last testimony on rebuttal on the ground it isn't rebuttal.

The Court: It seems to me it is clearly rebuttal because of the fact Mr. Taylor called for this information and didn't receive it.

Mr. Licking: I am not speaking of that. I am speaking of the new summary which was introduced into the matter.

Mr. Harmon: That clearly is rebuttal, too, if Your Honor please.

The Court: Yes, I am satisfied it is.

Mr. Licking: May I have an opportunity to—may I have an opportunity to examine that document slightly there? I may wish to put on about five minutes of surrebuttal testimony. I [126] doubt if I will.

The Court: Do you want a recess now?

Mr. Licking: I think five minutes should be ample.

The Court: Recess.

(Recess.)

Mr. Licking: Will you take the stand, please, Mr. Taylor?

## F. ALLEN TAYLOR

recalled for the plaintiff, in surrebuttal; previously sworn.

## Direct Examination

By Mr. Licking:

Q. I call your attention now to Exhibit 8, this exhibit consisting of four sheets, lists fixtures concerning the installation of which the dispute arose, correct?      A. Correct.

Q. And this, referring to Exhibit 6-A, lists delivery of the items which are set out in the delivery dates—the delivery dates of the items set out in Exhibit 6-A set out the delivery dates of the items set out in Exhibit 8?      A. That is right.

Q. You have now before you a copy of Plaintiff's Exhibit No. 9?      A. Yes.

Q. And you also have with you your summary of the material you had, plus that furnished by the claimants, that is, the claimants' time cards, ledgers and so forth?      A. Yes. [127]

Q. Could you state to the Court wherein the summary, which was admitted by the Court as Plaintiff's Exhibit No. 9, differs, if at all—that is as to items included—from those submitted in support of the original claim?

Mr. Harmon: May I have that question, please?

(Question read.)

A. I haven't had time, of course, to figure it out to the penny, but I see some items that are roughly different from our estimate of \$5800.

Q. (By Mr. Licking): I am not asking about

(Testimony of F. Allen Taylor.)

your estimate, I am asking if there are any items that are different than those that are submitted in support of the original claim, the payrolls and data that were submitted.

A. Different from the original claim?

Q. Different from the data submitted in support of the original claim.

A. In the original claim the total cost was submitted as \$13,000 and we had no data, breakdown of it.

Q. Except the payrolls?

A. Except the payrolls.

Q. And you had also the invoices submitted by the subcontractors too——

A. Yes.

Q. ——to the main company, but that was all you had. Now, referring to the summary which you prepared and the summary analysis [128] of the ledger sheets and time cards and other data subsequently submitted in support of the claim in this action, is there any difference that you note between this summary of costs which is Plaintiff's Exhibit 9 and your summary in that respect?

Mr. Harmon: Objected to as irrevelant and immaterial.

The Court: That seems to me to be the most relevant question I have heard here. Overruled.

A. Yes, there is a difference between this and the summary that we prepared.

Q. (By Mr. Licking): Can you explain it to the Court, please?

A. This——

(Testimony of F. Allen Taylor.)

Q. "This" referring to——

A. It is Exhibit 9—is that it?

Q. Referring to this summary of costs which is submitted as Plaintiff's Exhibit 9.

A. Yes. It includes the first four payrolls—that is prior to October 20.

Q. The first four payrolls?

A. Those are the payrolls for Harmon.

Q. What periods?

A. From the period ending September 23 to period ending October 14, 1942, which total roughly \$3500 in a list of actual handling and installation costs of hot water heaters, water closets, lavatories and sinks.

Q. (By Mr. Licking): At that time had there been delivered [129] any items other than heaters?

A. The first delivery of lavatories and sinks was October the 20th or 21st.

Q. The oil heaters and water heaters were delivered, according to Exhibit 6-A, on August 4.

A. They were delivered early.

Q. And up till the 21st there had been no other items delivered?

A. That is true.

Q. That is, of these items described in Exhibit 8. What charge, did you say, is ascribed on the amount of payrolls from 9-23 to 10-21, just roughly?

A. About 35 or 36 hundred dollars.

Q. I am just asking for a rough statement because it is a matter of computation which the Court can make from the summary. There is about \$3600

(Testimony of F. Allen Taylor.)

there; that is, in the first item in this summary, payrolls.

Now, going down to the next item, actual handling and installation costs.

A. That item is for gas ranges only installed from October 14 to December 9, and that figure amounts to——

Q. I am not asking what it amounts to, I can read it off this, but I am asking what discrepancy, if any, was there between that and your summary.

A. Ours is about the same. That is consistent.

Q. That is, as to the actual cost? [130]

A. Yes, the cost of installing—handling gas ranges we have the sum of 290 and 429, makes approximately 720——

Q. Which you allowed?

A. So we figured we have no difference in that item.

Q. And that you got from the ledger sheets here?

A. We got that from the ledger sheets.

Q. Can you, just for the Court, point that out on the ledger sheet?

Mr. Harmon: Which item is it you are talking about, Mr. Licking?

Mr. Licking: Talking to the second item, your summary, actual cost of installation of each item, gas ranges.

A. It is—item No. 41 is a special ledger sheet here for it, and items are apparently posted from the payroll there marked “Gas ranges.”

(Testimony of F. Allen Taylor.)

Mr. Licking: If the Court please, it was stipulated with reference to these ledger sheets that the items which are marked and checked in red here were the items which were the basis of the original claim.

Mr. Harmon: I don't recall that was stipulated, but the amounts were checked.

Mr. Licking: Well, that is a fact, is it not, Mr. Nickel?

Mr. Nickel: I will take the stand any time you want me to——

Mr. Licking: If you will do it now just briefly.

Mr. Nickel: I checked it all with payrolls——

Mr. Licking: I didn't ask you that. I asked you if it is not a fact that the figures checked in red on these ledger sheets were the figures from which your original claim was made?

Mr. Nickel: Those with two checks were an audit check of the entire payrolls, yes.

Mr. Licking: For that purpose was that red ink or red crayon put on there?

Mr. Nickel: Checked from our payroll.

Mr. Licking: What?

Mr. Nickel: Our entire audit sheet I checked with a double check, you might call it.

Mr. Licking: Weren't those red figures put on there and didn't you state to me in the presence of your counsel and in the presence of Mr. Lynch, Mr. Ferguson and the witness here that these figures appearing on your ledger in red, those eight items, were the basis of the claim?



(Testimony of F. Allen Taylor.)

Mr. Nickel: I did not.

Mr. Licking: You did not?

Mr. Nickel: You asked me about those red figures. I told you those were credits rather than debits.

Q. Well, they show items paid. Those have no relation to the claim as originally submitted?

Mr. Nickel: Red check marks?

Mr. Licking: Yes.

Mr. Nickel: The red check marks—— [132]

Mr. Licking: Yes.

Mr. Nickel: ——have no connection with this claim.

Q. (By Mr. Licking): Have you any recollection on that, Mr. Taylor? Did you check over this ledger?

A. I don't recall the red checks that you have reference to. May I see them?

Q. Well, there are certain red check marks appearing on all the ledgers here.

A. I can't testify as to the check marks.

Q. You can't testify as to the check marks. Did you check over the ledger entries with reference to the original claims or did Mr. Ferguson do that?

A. Mr. Ferguson did all the spot checking.

Q. All right. If you will get off the stand a moment, please. May I withdraw this witness temporarily?

The Court: You are going to put him back on?

Mr. Licking: Very well. Mr. Ferguson.

## GUY H. FERGUSON

recalled for the defendant in surrebuttal, previously sworn.

## Direct Examination

By Mr. Licking:

Q. Mr. Ferguson, I show you now what purports to be the ledger sheets of the Frick Company, the subcontractor, whose invoice to the complainant here is a part of the basis of the complainant's claim. Have you seen those before? [133]

A. Yes, sir.

Q. What was the occasion of your first seeing them? Do you remember when it was?

A. Approximately about two weeks ago I first seen these.

Q. And that was after you were in attendance in court when this case was originally called for trial?

A. It was after that case was called here.

Q. After the case was called for trial?

A. Yes.

Q. Do you recall at that time being present at a conversation between Mr. Nickel and Mr. Lindsay and counsel, when I requested to be furnished with the basis for the claim, that is, the original entries? A. That was in your office, yes.

Q. At that time it was agreed there would be furnished the ledger sheets and also the time cards?

A. Yes.

Q. Do you recall a conversation with Mr. Nickel

(Testimony of Guy H. Ferguson.)

concerning the significance of the red check marks on the ledger?

A. Yes, I remember there was something mentioned about the red marks here.

Q. There was something mentioned?

A. Yes.

Q. As a matter of fact, weren't these red marks stated to be the indicia of those items which form the basis of this claim? [134]

A. The——

Mr. Harmon: If the Court please,——

A. The red checks——

Mr. Harmon: Just a moment, Mr. Ferguson—I object to that question on the ground it is leading and also an attempt to impeach Mr. Nickel on an immaterial matter.

Mr. Licking: It is a collateral matter, whether he lied or not.

Mr. Harmon: Well,——

The Court: Overruled.

A. I understand that the red entries in here——

The Court: No, not the understanding——

Q. (By Mr. Licking): You understood the conversation between Mr. Nickel and myself in your presence?

A. That is what I am saying. I understood that the red entries in here were credits that they had put in there.

Q. (By Mr. Licking): Credits that they had put in there?

The Court: You understood—that means nothing.

(Testimony of Guy H. Ferguson.)

Mr. Licking: —were credits that they had put in there—did or did not those red entries have any relation to the claim?

A. They might not have any bearing on this particular case that we have because this is the general ledger here.

Q. It might not have any bearing on it?

A. Yes, it couldn't have any bearing on it, and then possibly in some cases it might be an entry that would apply to the [135] installation.

Q. I asked you to check this ledger—the ledger entries. A. I did.

Q. With reference to the claim here?

A. Yes.

Q. Well, what is the significance of the red checks?

A. What the red checks are on here I don't know, these check marks. The check marks weren't discussed. The way I understood it, it was the entries in here that were in red.

Q. The entries in red?

A. The entries in red. That is my understanding.

Q. The entries in red were what you checked?

A. No, I checked payrolls here as he has it listed under the item of installation, that is what I have checked from these ledgers.

Q. Then the red entries meant nothing to you?

A. No, sir.

Mr. Harmon: I move it all be stricken.

(Testimony of Guy H. Ferguson.)

Mr. Licking: Then I am mistaken about that.

A. No, the red entries didn't mean anything to me.

Mr. Licking: I am mistaken about that. That is all.

Cross-Examination

By Mr. Harmon:

Q. Mr. Ferguson, while you are on the stand, just one question: Isn't it true that the time cards and ledger sheets were delivered to you and you had the fullest opportunity [136] to check one against the other—against the architect's report?

A. I did.

Q. And you found them in substantial agreement, did you not?

A. They are substantially correct, according to the ledger sheets where he has them itemized as installation.

Mr. Harmon: Thank you. That is all.

Mr. Licking: That is all.

Mr. Harmon: Are you putting Mr. Taylor on now?

Mr. Licking: Yes. I have no further cross-examination.

The Court: Have you any cross-examination?

Mr. Harmon: I have one question to ask of Mr. Taylor. I am not sure that I understood his testimony. I want to be sure on it, and then I want to ask him a question on it.

## F. ALLEN TAYLOR

was recalled for the defendant in surrebuttal, previously sworn.

## Cross-Examination

By Mr. Harmon:

Q. Did I understand the purport of your testimony when you were last on the stand as to the difference between your summary and the plaintiff's Exhibit 9 was certain items which appear on that exhibit prior to the date of receipt as shown on the document of those items, is that right?

A. That is true.

Q. In other words, your thought is, or your testimony is that there are charges here for installation of certain items which [137] have not yet been received, is that right?

A. That is right.

Q. All right. Mr. Taylor, are you not aware of the fact that to make an installation of that nature out there, it is necessary to do a large amount of what they call prefabrication work, so that the installation can be completed without delay when the fixture arrives?

A. I am glad you asked me that, because I believe that from the ledger entries some of the entries are marked "Prefabrication and installation," which meant that they have charged against the installation of fixtures the prefabrication of the pipes in the shop off of the site and then when that is delivered to the site, they have installed prefabricated pipes for the fixtures, and in this case



(Testimony of F. Allen Taylor.)

maybe the bathtubs were backed up to the site and added to the prefabricated pipes, and it appears in the records from the ledger in some of the items where it says, "Prefabrication and installation." They have included as the cost of installing plumbing fixtures some of the labor which went toward the prefabrication of the pipes in the shop off the site. That went on over there as well as at the site itself, so it is very difficult to distinguish from the entries in the ledger just which items went for the actual installation of fixtures, and that is why we have taken a greater scope of payrolls in making our take-off from the cards than you have. [138]

Q. Mr. Taylor, due to the fact—your answer is not responsive, but I don't think I will move to strike it, because he has said somethings that bring us down to the meat of this thing—you have sought to eliminate so far as you could any charge for this so-called prefabrication, is that right?

A. I don't like to put it that way.

Q. Isn't it true—you can answer it yes or no and then explain it.

A. No, because I am not in a position of eliminating any charges; I am in a position of attempting—I always have been—attempting to find out what labor the contractor expended which was in addition to his contract requirements, the additional labor by reason of installing plumbing fixtures at the direction of the Government men in the field, and as far as I could find, there is only one entry in the book I can call your attention to on this

(Testimony of F. Allen Taylor.)

exhibit that shows that there is an extra charge.

Q. Never mind, Mr. Taylor. Come back to the question I have already asked you and give me an answer directly to this question without explanation.

A. All right.

Q. Are you not aware of the fact that before plumbing fixtures or oil heaters or ranges or whatever was called for in these mass purchase units could be installed there had to be a prefabrication of connections and what not so that the fixtures could be fitted into place properly?

Mr. Licking: Counsel, may I ask you a question?

A. No.

Q. (By Mr. Harmon): You aren't aware of——

Mr. Licking: Counsel, do you now contend—do you gentlemen now contend that the prefabrication of pipe connections is a part of this claim that is merely for installation? Do you now contend that?

Mr. Harmon: It is our position——

Mr. Licking: If you do, if the Court please, I should like to be relieved from the stipulation under which the affidavit of Mr. Frick was introduced in this case. It was stated that all that was concerned in the original estimate of \$35 a unit—that is \$35 a room or a house for the installation—and may I see that itemization of fixtures? That is, all water heaters, lavatories, water closets, sinks, trays, refrigerators, and ranges—those unit installations, those were the things that were not delivered, there hasn't been any particular question as to pipe to which those would be attached would be delivered or

(Testimony of F. Allen Taylor.)

not, Mr. Frick's affidavit was to the effect that \$35 was the unit installation cost of installing the sink, the closet, the lavatory, all of the other items set off in the exhibit—of installing those—that is, just hooking them up to existing pipes, things that were there. Now, it seems that the claim is going to be attempted to be magnified into prefabrication of [140] pipe and other plumbing units to which those were to be attached, items in amplification of the claim not in good faith, and I will ask that Mr. Frick's affidavit be withdrawn and I be relieved from our stipulation admitting it.

Mr. Harmon: We, of course, resist that, if the Court please. I think Mr. Licking's request is based on a misapprehension of what we are trying to get at. It is the plaintiff's position, if Your Honor please—we are concerned here with the cost of installation of fixtures and items which the Government wants to supply. Now, that term "installation" as it was used here, and if Mr. Frick were here, he would so testify, and we will put Mr. Lindsay on to that effect—the cost of installation of those includes not only the physical picking up of a fixture from the railroad siding and carrying it over and setting it down in the house, but it also included the necessary fittings to connect it to the flues and the pipes and what not, and not a part of the rough-in plumbing. Now, that is the cost which is covered by this estimate of \$35 per unit, covering what we might term in language comparable to the finished plumbing.

(Testimony of F. Allen Taylor.)

Now, this is all we are claiming here, taking the total cost of prefabrication and so on and the actual cartage and carrying and fitting it there, which under normal circumstances could have been done for \$35 per unit or less, but it was done at an actual cost of thirteen thousand odd dollars.

Now, in an attempt to dispute our claim these Government [141] auditors, based on the limited examination they had, have sought to eliminate that part of our costs, which are legitimate, and that is the only question we have here on this point and I submit that it is proper, a proper part of the installation cost and it goes to make up the total cost of installation of these plumbing fixtures. We are not asking for more damages because of delay in finishing pipes and things like that, but we do want to show that the witness has eliminated charges arbitrarily occurring on a certain date, ignoring the fact that the flues and the pipes and so on had to be prefabricated and fitted into the unit, and those are charges which we submit are proper.

Mr. Licking: May I ask one question, counsel—I don't want to have any difficulty in understanding your position—you stated your position to the court originally that what you claimed here was not for extra work done under the contract but for damages for breach of contract.

Mr. Harmon: That is right.

Mr. Licking: I believe the Court so understood the issue of this case.

(Testimony of F. Allen Taylor.)

Mr. Harmon: That is right.

Mr. Licking: And that damage consisted in the failure of the Government to deliver certain items which it is stipulated are the items set out in Exhibit 8, right?

Mr. Harmon: That is correct.

Mr. Licking: You are now questioning the witness about [142] prefabrication of items, no part of which is covered in Exhibit 8, right?

Mr. Harmon: No.

Mr. Licking: Do you mean any of the prefabricated items or any of the items of preliminary plumbing are in those items which you allege the Government failed to deliver?

Mr. Harmon: No, these are the units——

Mr. Licking: These are the units which were to be installed?

Mr. Harmon: Certainly.

Mr. Licking: And these preliminary installation costs were the matter of getting the pipes and other things ready for getting ready to hook these fixtures to, is that right?

Mr. Harmon: That is a part of the installation costs, yes. [143]

Mr. Licking: Now wait a minute; the things about which you are questioning him now are not items concerned with this except that it was something to which these fixtures must be eventually hooked up.

Mr. Harmon: It is a part of the things that must



(Testimony of F. Allen Taylor.)

be taken into consideration in estimating and figuring damage.

Mr. Licking: If that is your position I will renew my objection.

Mr. Harmon: That is the point.

Mr. Licking: I will renew my objection to the interrogation of the witness on that point, those preliminary plumbing points, that is not the question before the court. Whether those preliminary costs may be considered by the court as an item of damages for the failure to deliver things subsequently to being installed, that is the matter, the main item that the government eliminated from the original claim and about which Mr. Taylor has testified here. I object to any evidence on that score that it isn't connected and cannot be connected with the alleged breach here. Whatever the cost was of getting the building ready for the installation of these things, the various items set out in exhibit 8, that cost was not added to by the fact that the fixtures were later delivered.

Mr. Harmon: No, that is true. The added costs came from the late delivery of the fixtures.

The Court: What does that have to do with the prefabrication [144] on these fixtures?

Mr. Harmon: Simply this, your Honor, that if it is eliminated on one side of the ledger it must be eliminated on the other side. Now in computing our damage it has been done on the basis of the difference between the cost of installation of these fixtures which included each fixture at \$35 and what



(Testimony of F. Allen Taylor.)

the actual cost was. Now if you eliminate over here where the actual cost is you must also eliminate it in the \$35, and if you do that you will get the same result. I am confident.

Mr. Licking: We are not—counsel, just a moment—as I see it—pardon me for taking the Court's time further on something that seems evident—we are not discussing here a question of total cost of installation; we are discussing now the damages because of failure to deliver certain items on August 4th.

The Court: No, I can't see how it goes into the question of damages; the cost would be there whether there was delivery or not.

Mr. Harmon: That is very true, your Honor, but doesn't your Honor see that, as the testimony shows, the reasonable cost of doing that was \$7000—\$7100, I think it is—and that \$7100 includes a provision for this prefabrication. Then if you take it out of there—you have got to take it out of that \$7100——

The Court: Well, to hurry this along I will overrule the objection.

Mr. Harmon: We will be glad to argue that in the streets. [145]

Mr. Licking: If the Court please, I want to look at Mr. Frick's affidavit again and if Mr. Frick's affidavit or the testimony of anyone here—if there is any basis for the fact that prefabrication is a part of the installation estimate and there is anyone who will testify that that is a plumbing custom, I

(Testimony of F. Allen Taylor.)

want an opportunity to put other evidence on the stand, because that isn't so understand, I don't think that is the case.

Mr. Harmon: We are ready to take an issue on that, if the Court please.

Mr. Licking: You have already taken an issue on it and there is no evidence in the record——

Mr. Harmon: We will call Mr. Lindsay on that point.

The Court: Are you through with this cross-examination?

Mr. Licking: What was the last question?

(The last question and answer were read by the reporter.)

Mr. Harmon: We will put Mr. Lindsay on.

Mr. Licking: For what purpose?

Mr. Harmon: To testify to prefabrication.

Mr. Licking: If the Court please, I object to the examination of the witness on the ground it is not rebuttal. Now it appears that it is cross-examination in order to create a new issue.

The Court: What is before me now?

Mr. Licking: Mr. Lindsay, I understand, is now to take the stand and testify on the issue which we have just been [146] discussing here, that is, counsel offered to put him on the stand. It seems to me it is not rebuttal, it is part of the case in chief. It is a new issue and a surprise to me.

The Court: Proceed.

RAY T. LINDSAY

recalled as a witness on behalf of the plaintiff, in rejoinder.

Direct Examination

By Mr. Harmon:

Q. Mr. Lindsay, will you state what work was covered in the estimate of \$35 per unit and the \$105 for the community building which was the basis on which your bid was made?

Mr. Licking: To which I object on the ground that the estimate itself is the best evidence; the further objection that the estimate here is not the estimate of Mr. Lindsay but the estimate of the subcontractor, Mr. Frick.

The Court: Overruled.

Mr. Licking: Mr. Frick's affidavit is before the Court, and that Mr. Lindsay's testimony as to the basis of Mr. Frick's estimate is clearly hearsay.

The Court: He made his estimate for the bids, didn't he?

Mr. Licking: Yes.

The Court: You may answer.

A. The estimate we submitted included a portion of the fittings and entire prefabrication directly in connection with the installation of the mass purchase items. [147]

Q. (By Mr. Harmon): Does that include the item of prefabrication to connect these items?

A. Yes.

Q. That is not a part of what you call the rough-in plumbing, is it?           A. No, it isn't.

(Testimony of Ray T. Lindsay.)

Q. Did you have a determination as to what the—I will withdraw that question. In other words, your estimate of \$35 per unit as a reasonable cost included not only the actual physically putting in place of these items but all connections, the pre-fabrication of those connections, the preparing of the pipe and chimneys, and so forth.

Mr. Licking: The question is highly leading.

The Court: Very leading.

Mr. Harmon: It is leading, your Honor. I am trying to shorten it.

Mr. Licking: By what device are you trying to shorten it?

Mr. Harmon: I will withdraw it.

Q. Will you state again, Mr. Lindsay, so we will have it clear——

Mr. Licking: Objected to on the ground it has been asked and answered, whatever he said before.

The Court: It has been asked and answered.

Mr. Harmon: All right, take the witness.

#### Cross-Examination

By Mr. Licking:

Q. So that the cost of getting the building [148] ready—the cost of getting the connection plumbing ready for installing these various items set out in exhibit 8 here was a part of your estimate of the cost of installation?

A. I didn't say the cost of getting the building ready——

Q. Well, getting the connection plumbing ready?

(Testimony of Ray T. Lindsay.)

A. Those things which were directly a part of the finished installation, yes.

Q. Those things which were directly a part of the finished installation, all right. Now, for instance, take the toilet bowl. Which of those fittings—what do you do before you get the fixtures set out here, take that one fixture, that is, the water closet and seat, that is one of the items on the second sheet of exhibit 8.

A. In the water closet you have pipes running from the outlets which come through the wall up into the tank itself and also the pipe which comes in at the base of it, and then also the connections at the bowl, and many of those have to be pre-cut and prefabricated for economy prior to installation.

The Court: The pipes have to be pre-cut?

A. Yes, and in many cases prefabricated or connected together.

Q. Prefabricated? A. Yes.

Q. Prefabricated or connected together?

A. Not only the cutting up into lengths but the threading of them and the connecting to the units, the entire fittings. [149]

Q. And that is the same sort of thing with reference to the gas ranges?

A. Yes. And water heaters.

Q. And that is the same sort of thing with reference to lavatories? A. Yes.

Q. But none of those prefabrications you talk

(Testimony of Ray T. Lindsay.)

about are a part of the items shown by this purchase order, exhibit 8?

A. No, they didn't come——

Q. Now, wait a minute. None of these items that you have explained about prefabricating are a part of the items shown by this exhibit 8?

A. I wouldn't say all of them.

Q. No, any of them?

A. There may be some fittings that came with them, but a good many of them——

Q. Wait a minute. These things that you say you had to prefabricate before you could put in these fittings, which you mention here in exhibit 8—do you understand my question?      A. Yes.

Q. I say none of the matters you talk about prefabricating are a part of these items as ordered?

A. None of them, I don't believe they are.

Q. Well, do you know, you know quite well they aren't, don't you, that none of these things you speak of prefabricating are [150] included in the items here in exhibit 8, is that right?

A. For example——

Q. Not for example; if you can, answer my question.

A. Not quite all of them are.

Q. None of them are; I ask you again, isn't it a fact that none of these prefabricated things you are talking about, that you have to prefabricate, are a part of the items as ordered in exhibit 8?

A. No, they are not part of this.

Q. That is what I asked you.



(Testimony of Ray T. Lindsay.)

A. But they are necessary in connection with the installation of them. You can't install them unless you have them.

Q. Certainly, and I take it you can't install a water closet unless you have a sewer pipe leading down to the sewer.

A. You can run the piping down through the floor if you don't care where the water goes or what happens.

Q. And I suppose you could hook it onto the floor without any pipe?      A. Yes, but——

Q. All right, we will get down to my question—have you another thought in the matter?

A. You have to have fittings to connect them properly so they will operate.

Q. Yes, but none of these fittings about which you are talking here, none of the prefabrication items about which you are [151] talking are a part of any of these items ordered in this request?

A. No, they are not.

Mr. Licking: All right, that is all.

### Redirect Examination

By Mr. Harmon:

Q. Mr. Lindsay, was any of this prefabrication work done prior to the receipt of the actual fixtures that were installed?

Mr. Licking: To which I object on the ground it is immaterial, has nothing to do with the claim for damages in the case.

The Court: Overruled.

(Testimony of Ray T. Lindsay.)

A. Yes, it was.

Mr. Harmon: That is all.

Recross-Examination

By Mr. Licking:

Q. As a matter of fact, all of it was done before the items were installed, wasn't it?

A. Mostly prior to the installation, for the purpose of economy.

Q. Certainly, for the purpose of economy?

A. That is right.

Q. So far as that particular item was concerned, that is, the item of prefabrication, the work on this place, the failure to deliver did not increase that particular cost at all, did it?

A. In order to install——

Q. Will you answer the question? Answer yes or no and then give me the explanation. Do you understand my question? [152]

A. Give me the question.

Mr. Harmon: Let him read it and then let him give his answer and if he wishes——

Mr. Licking: I would like to have the answer first. Do you understand my question or do you want me to reframe it?

(Question read.)

A. Yes, it did increase it.

Q. How?

A. Because we had to go in and use these fittings separately, as we installed each item separately.

(Testimony of Ray T. Lindsay.)

The Court: It didn't increase the cost of the prefabricated items, did it?

A. No, it didn't, but the \$35 amount which we included in there included that cost as I have testified.

Q. (By Mr. Harmon): Why?

A. Because there is no way you can connect up a fixture without fittings and without the responsibility of connecting these fittings?

Q. (By Mr. Licking): But there wasn't any reason why you couldn't get all of the pipes ready and all of the prefabrication ready whether or not the fixtures were delivered? A. Yes.

Q. Why?

A. Because a good many of the fixtures we had been furnished shipped threading on, but we couldn't rely on it because sometimes [153] fixtures came even from the shop and there without being threaded by the government and we had to wait.

Q. All right, did you wait?

A. In some instances we did and in other instances we didn't.

Q. Why didn't you wait in all instances?

A. Because the plumber used his own judgment. If he did, there might be a joint off or something, and if he didn't prefabricate a lot of stuff he would have been wrong.

Mr. Licking: That is all.

Mr. Harmon: That is all. May we have twenty days, if your Honor please, to submit it?

Mr. Licking: I renew my motion, if the Court please.

The Court: I will consider that.

Mr. Licking: I want to renew it simply for the purpose of the record.

The Court: Very well, it will be so understood. Twenty, twenty and ten?

Mr. Licking: I want one further statement for the record: Your Honor has used the evidence in the case here and the nature of the claim as set out—that is, it is not a claim under contract—the statement in the pleadings that it was found that a certain amount was due and that a certain amount was in truth and in fact is, we ask to amend the pleadings on the faith in view of the testimony here adduced, that is, in view of the full picture of the ledgers and time cards and so forth [154] before the Court, that nothing was due at the time of the \$2600 adjustment. We would like to amend the pleadings to that effect.

The Court: That may be done. Twenty, twenty and ten, then it will stand submitted.

#### Certificate of Reporter

I, Clarence F. Wight, Official Reporter, certify that the foregoing pages 105-154-A comprise a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting to the best of my ability.

/s/ CLARENCE F. WIGHT.

[Endorsed]: Filed March 16, 1949. [154-A]

[Endorsed]: No. 12262. United States Court of Appeals for the Ninth Circuit. Claude T. Lindsay and Martel Wilson, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: June 10, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

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United States Court of Appeals for the  
Ninth Circuit

No. 12262—S-L

CLAUDE T. LINDSAY and MARTEL WILSON,  
Plaintiffs,

vs.

UNITED STATES OF AMERICA,  
Defendant.

APPELLANT'S STATEMENT OF THE  
POINTS ON WHICH THEY INTEND TO  
RELY ON APPEAL

Come Now the appellants in the above matter and present their statement of the points on which they intend to rely on appeal as follows, to wit:

1. The court erroneously concluded that Article

15 of the contract sued upon by plaintiffs constituted an arbitration agreement between the plaintiffs and defendant with respect to the plaintiffs' claim herein.

2. The court erred in holding that since Article 15 of the contract was an arbitration agreement and since the determination of the amount of damages by the contracting officer was not unreasonable, and not arbitrary or capricious, and since there was no such discrepancy or inadequacy between the amount sought and the amount allowed by the contracting officer as to indicate corruption or a partisan bias, that the court was not justified in setting aside the award of arbitration.

3. The court erred in ruling that the plaintiffs could not be awarded damages in excess of \$2696.00 (the amount allowed by the contracting officer) resulting from the breach of contract by defendant, since the award of the contracting officer could not be set aside unless it was unreasonable, arbitrary, capricious or showed such discrepancy or inadequacy between the amount sought and the amount allowed as to indicate corruption or a partisan bias on the part of said contracting officer.

4. The court erred in not rendering judgment in favor of plaintiffs against defendant in the amount of \$6,833.61.

5. The court erred in not finding that plaintiffs were damaged in the amount of \$6,833.61 by reason of defendant's breach of the contract sued upon.



Dated: June 13, 1949.

JOHNSON, HARMON,  
STIRRAT & HENDERSON.

By /s/ WILLIAM H. HENDERSON,

Attorneys for Plaintiffs, Claude T. Lindsay and  
Martel Wilson, 1400 Central Tower, 703 Mar-  
ket Street, San Francisco 3, California.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Jan. 17, 1949.

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[Title of U. S. Court of Appeals and Cause.]

### DESIGNATION OF RECORD ON APPEAL

Come Now the appellants in the above matter and designate the record which is material to the consideration of the appeal as follows, to wit:

1. The pleadings of the parties;
2. The Findings of Fact and Conclusions of Law;
3. The Judgment appealed from;
4. The Notice of Appeal;
5. The Designation of Contents of Record on Appeal;
6. The Reporter's transcript of the evidence and proceedings.

It is requested that all exhibits be transmitted to

the said Court of Appeals, together with the printed record.

Dated: June 13, 1949.

JOHNSON, HARMON,  
STIRRAT & HENDERSON.

By /s/ WILLIAM H. HENDERSON,  
Attorneys for Plaintiffs.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed June 17, 1949.